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A

TREATISE

OF THE

LAW OF PROPERTY

ARISING FROM THE RELATION

BETWEEN

Husband and Wife.

BY R. S. DONNISON ROPER, ESQ.
OF GRAY'S INN, BARRISTER AT LAW.

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WITH ADDITIONS,

BY EDWARD JACOB, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

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A

TREATISE

ON THE

LAW OF PROPERTY

ARISING FROM THE RELATION

BETWEEN

HUSBAND AND WIFE.

CHAPTER XIII.

THE WIFE'S INTEREST IN HER HUSBAND'S PERSONAL ESTATE.

THE subjects intended to be treated upon in this chapter, are

I. *The wife's interest in her husband's personal estate under the statute of distribution, and under the customs of the cities of London and York.*
II. *What will be a bar to such her interests.*

Wife's interest under the statute of distribution.

I. With respect to the wife's interest in her husband's personal estate under the statute of distribution, if she survive her husband, who happens to die intestate, leaving children, and without having made any settlement upon the marriage to the prejudice of her right, she will be intitled by the statute (*a*) to one-

(*a*) 22 and 23 Cha. II. chap. 10, made perpetual by 1 James II. chap. 17, sect. 5.

third part of his personal estate; and if there be no child, then to a moiety.

But this interest of the wife, as also her interests by the customs after mentioned, are under the absolute power and control of her husband; for if he make a will disposing of his personal estate, she cannot claim any part of it in opposition to that disposition.

Such is the widow's title under the statute of distribution; but her share in her husband's personal estate may be augmented by particular customs, which we will next consider.

According to the customs of the city of *London* and the province of *York* (which in regard to the widow are nearly the same), if a freeman of London, or an inhabitant of the province of *York*, having a wife and children, die intestate, possessed of personal estate more than sufficient to pay his debts and funeral expenses, his residuary estate will be distributable under the statute and the customs, in the following manner: after deducting the furniture of the widow's bed-chamber, and apparel, called the *widow's chamber*, and to which she is intitled, or the sum of 50*l.* in lieu of it if her husband's estate exceed in value the sum of 2000*l.* (*a*), the property is to be divided into three shares; one of which belongs to the widow, another to the children, and the third to the intestate's administrator, which is called the *dead man's share*; and by statute 1 James II., chapter 17, that share is made distributable according to the statute of distribution; so that of this third the widow is intitled to one-third, and the children to the remaining two-thirds: if, then, the intestate's residuary personal estate amount to 1800*l.*, and he leave a widow and two children, the division will be into eighteen parts; of which the widow will be intitled to eight, six by the custom, and two

Widow's chamber.

Distribution.

(*a*) Biddle v. Biddle, 7 Vin. Abr. 201.

by the statute; and each of the children will be intitled to five, three by the custom, and two by the statute. But suppose the father to have left a widow and only one child, still she will be intitled to eight shares, and the child to ten, six by the custom, and four by the statute; and if there were no child, then the widow would be intitled to three-fourths of the whole, two by the custom, and one by the statute; the remaining fourth being distributable, under the statute, among the intestate's next of kin (*a*).

Effect of freeman's agreement that his personal estate shall be distributed according to the custom.

It has been observed that a freeman may exclude the customs and the statute by making a will disposing of his personal estate; but it sometimes happens, that a freeman engages before his marriage that his personal estate shall go at his death according to the custom, which is a good and binding agreement. In such cases, two-thirds of his residuary personal estate will be distributable according to the custom, notwithstanding his will; but the remaining third, or dead man's share, will pass by it (*b*).

Since the interest of the widow of a freeman of *London* or an inhabitant of the province of *York*, in her husband's personal estate, is materially concerned in questions when these customs attach, and when the children are, or are not, wholly or in part excluded from taking under them, it is necessary briefly to consider these subjects.

I. There must be an intestacy to enable the customs and the statute of distribution to affect the personal estates of freemen and other persons.

Effect of the customs and the statute under an *equitable* intestacy.

But it may happen that a freeman or other person may make a will appointing an executor, and yet die intestate in equity, which occurs when either he makes no disposition of his residuary property, or having made such, the residuary legatee dies before him, and the

(*a*) 2 Black. Com. 518. 2 Salk. 426. (*b*) 2 Vern. 111.

executor is not allowed to take it beneficially under his *legal* title, but is declared a trustee for the testator's next of kin. Different opinions prevail upon the point, whether the residue is to be distributed according to the customs and the statute; which is of great importance to the widow in regard to the extent of her interest in her husband's personal estate. It is the opinion of some persons that the customs and the statute are only applicable where there is a *legal* or *actual* intestacy, *i. e.* where there is not a complete will by the appointment of an executor; whilst other persons are of opinion that there is no difference between legal and equitable intestacy, as to the operations of the customs and the statute. There are few decisions upon the subject, but the weight of authority preponderates against the opinions that equitable intestacies are within the customs and the statute, except so far within the statute as Courts of Equity have referred to it in order to fix the proportions which the next of kin should take in the equitable residue. The principle appears to be this; that where a freeman makes a will, and appoints an executor, the whole personal estate vests in him, and nothing is left for the customs to operate upon; and that although in the division of the property, a Court of Equity acts by reference to the statute of distribution, yet that it does not so act upon the ground that the case is within it, but only as a proper standard to fix the shares of the next of kin.

We shall now consider the decisions.

In *Beard* v. *Beard* (*a*), *A*, a freeman of *London*, being at variance with *B*, his wife, devised all his real and personal estates to his brother *C*, and appointed him *executor*. *A*, by deed poll, afterwards gave and granted to *B all his substance* which he then had, or might thereafter have. *C* obtained probate of the will,

(*a*) 3 Atk. 72.

and *B*, claiming under the deed, sought relief in equity, insisting that such deed was a revocation of the will. *Lord Hardwicke* held the will to be revoked by the deed, although *B* could take nothing under such deed, because a wife could not take by immediate grant or conveyance from her husband (*a*). His Lordship also determined that the executor was a trustee for the next of kin, and he ordered the residue to be distributed according to the custom of the city of *London*, expressing an opinion that there was no difference in law between an *absolute* and a *qualified* intestacy.

Although *Lord Hardwicke* is reported to have expressed himself to the above effect, yet the case itself appears in fact to be one of actual intestacy: the will was revoked *in toto*, and it is probable that probate was granted by the Ecclesiastical Court in ignorance of the total revocation of the will by the deed; for it cannot be presumed that the Court would have issued probate of a revoked instrument, if that circumstance had come to their knowledge.

The last case was followed by that of *Lawson* v. *Lawson*, before *Lord Bathurst*, in which the question was, who was intitled to the residue of a testator's personal estate, under the following circumstances.

A having his domicil, and being resident within the province of *York*, made his will; and after disposing of his real estates, bequeathed to his widow a debt of 300*l.*, and appointed her executrix. *A* made no disposition of the residue of his personal estate, and died without children, leaving his widow, and a nephew and niece his next of kin. Two questions arose in the cause; first, whether the legacy prevented the widow from taking the residue beneficially, as executrix; and secondly, if that were so, then whether such residue was to be distributed according to the custom of the

(*a*) See vol. 1. p. 53.

province. These questions were decided by *Lord Bathurst*, who by his first decree, in March 1772 (*a*), declared that the widow was to be considered a trustee of the testator's residuary personal estate beyond the 300*l.* debt specifically bequeathed to her, and that such residue was to be divided according to the custom of the province of *York*, by which she was intitled to one moiety of the residue, and also to a half of the remaining moiety; and that the other half of such remaining moiety belonged to the plaintiffs (the next of kin), &c. This decree being unsatisfactory to the next of kin, the cause was reheard by his Lordship, and the case was fully argued before him, when he varied his decree so far as it related to the distribution of the estate under the custom, and declared (*b*) that the residue was to be divided according to the statute of distribution, by which the widow was intitled to one moiety, and the next of kin to the other. The widow appealed from this decree to the House of Lords, and it was reversed, the Court declaring that the widow was intitled to the whole of the residue as executrix (*c*); so that the opinion of *Lord Bathurst* upon the distribution in the case of intestacy was not impeached by the order of reversal, but it remains an authority, established upon debate and full consideration, against what *Lord Hardwicke* is reported to have said in the case of *Beard* v. *Beard*, before stated. The decision of *Lord Bathurst* is supported by the opinion of *Sir William Grant*, late Master of the Rolls (who was not in the habit of expressing opinions without due consideration) in a case of *Walton* v. *Walton*; and since his opinion coincides with that which I have formed on this question, I shall conclude the subject in his Honor's own words: "I conceive that the provision in the statute of distribution applies only to cases of *actual* intestacy;

(*a*) Reg. Lib. 1771, B. fo. 224 *b*, and 225 *b*. (*b*) Reg. Lib. 1775, B. fol. 337 *b*. (*c*) 4 Bro. Parl. Ca. 21, 8vo edit.

and where there is an executor, and consequently a complete will, although the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them: therefore a child advanced by its father, in his life, cannot be called upon to bring her share into hotchpot (*a*)."

[This opinion was followed in a late case (*b*). The testator, who was resident and domiciled within the province of *York*, by his will appointed executors, and gave the residue of his personal estate in shares to different persons, one of whom died in his lifetime. The Master of the Rolls held that the appointment of executors excluded the application of the custom, and that the lapsed share must therefore be distributed according to the statute.]

It is essential to the attaching of the custom of *York*, that the deceased should have his fixed or general residence within the province at the period of his death (*c*).

But this is not so required by the custom of the city of *London;* for that custom follows the person of the freeman, and operates whether he never resided in the city, or having lived there, quitted it, and became domiciled in the country.

Thus in *Rutter* v. *Rutter* (*d*), a freeman of *London* left the town, and lived in the country for twenty years, and married: his wife being the survivor, filed a bill for her share of his personal estate, according to the custom, and the defendant pleaded the husband's leaving the city, and his residence in the country, but the plea was disallowed.

If the two customs come in competition (as where an

Custom of York gives place to that of London,

(*a*) 14 Ves. 324. (*b*) Wilkinson v. Atkinson, 1 Turner, Ch. Rep. 255. See Also Wheeler v. Sheer. Mosely, 302. Cowper v. Scott, 3 P. W. 119. (*c*) See Swinb. part 3, sec. 18, where the custom is stated to apply to the case of every inhabitant or householder within the province of York, *dying there or elsewhere.* See also 5 Ves. 760, 790. (*d*) 1 Vern. 180. See 2 Vern. 110.

inhabitant of the province of *York* is also a freeman of the city of *London*), the custom of *London* will prevail and control that of *York* (*a*); so that the distribution must be made according to the rules of the custom of the city of *London*.

and does not extend to diocese of Chester.

But it must be remarked that the custom of the province of *York* does not extend to the diocese of *Chester*; upon this subject *Lord Alvanley* thus expressed himself in the case of *Pickering* v. *Lord Stamford* (*b*); "A vulgar error prevailed that the custom of *York* goes through the whole province; the legislature themselves fell into such error, by reserving to the citizens of *York* and *Chester* the customs of those cities; the latter of which has no custom. When by another act they repealed that as to the city of *York*, they left *Chester* just as it was by the first act. That custom of *York* never attached upon any part of the province which was not so at the time of Henry VIII., and *Chester* was annexed since that period."

With respect to property falling within the operation of the customs; it seems that they will extend to all the freeman's personal estate, wherever it may be (*c*).

Customs do not operate if there be neither widow nor child.

But in order to enable the customs to attach, the freeman must have left a widow or children; for if he die without either, his personal estate will be distributable amongst his (the intestate's) next of kin, under the statute of distribution (*d*).

Customs do not extend to grandchildren.

The customs do not extend to grandchildren; so that if there be neither widow nor children, but grandchildren, the intestate's property will be also distributable under the statute (*e*).

Advancements by freeman to his children, and the effect on widow's share.

When there are children, and they have been partially advanced by their father during his life, they

(*a*) Chomley v. Chomley, 2 Vern. 48—82. (*b*) 3 Ves. 338. See 4 Burn. Eccl. Law, 456. (*c*) See Toll. Ex. 402. (*d*) 4 Burn's Eccl. Law, 478. 2 Show. 175. (*e*) Fowke v. Hunt, 1 Vern. 397.

must bring their advancements into *hotchpot;* but if they have been fully advanced, then the customs will have been satisfied, and the intestate will be considered in the same view as if he had left no children: in that event the widow will be intitled to three-fourths of the whole of the intestate's personal estate; but a distinction must be observed between the circumstance, when there is but one child and the widow; for in that case, if the child be not fully advanced, the custom will not be satisfied, and the child will not be obliged to bring the partial advancement into hotchpot; because the custom only requires such partial advancement to be brought in when there are other children, in order to make an equality amongst them, and not for the benefit of the mother, or to increase the dead man's part (*a*).

The advancements must appear under the freeman's hand.

It seems that certainty in relation to the thing advanced, and not to its value (*b*), is necessary to appear under the *father's hand*, in order to induce a Court of Equity to direct an inquiry whether such advancement is or is not equivalent to the child's orphanage share (*c*); and if upon such inquiry it happen that the advancement is of less amount than that share, the deficiency will be made good out of the estate liable to the custom; but if the amount of the advancement do not appear under the father's hand, it is to be considered a full advancement (*d*).

As to bringing into hotchpot when advancements exceed orphanage shares.

Suppose, then, an advancement to exceed the orphanage part, opinions are at variance whether the child will be permitted to take under the statute of

(*a*) Cleaver v. Spurling, 2 P. Will. 527. Stanton v. Platt, 2 Vern. 754. See 9 Ves. 460. (*b*) 1 P. Will. 647. (*c*) Fawkner v. Watts, 1 Atk. 408. 2 Salk. 426. Dean v. Dalaware, 2 Vern. 630. Northey v. Strange, 1 P. Will. 342. City's certificate, stated 1 P. Will. 643, ed. by Cox. 3 Atk. 527. Chace v. Box, 1 Eq. Ca. Ab. 154, pl. 3. 1 Lord Raym. 484. (*d*) Cleaver v. Spurling, 2 P. Will. 527.

distribution, a share of the dead man's part, until it bring into hotchpot the advanced excess. The argument for the child's retaining the excess, and also having its share under the statute, is founded upon a supposed purchase by the father, of the child's orphanage share, so as to take it out of the custom, and make it a part of his estate, distributable under the statute; but unless such be the *express* agreement between them (*a*), this reasoning does not appear to be applicable, since the thing given may be considered a gift or advancement, as well as a consideration for such purchase. When, however, there is this express agreement between the parties, then, whether the child be benefited or not, it will be bound by the contract; but that this is not the case in the absence of such agreement, when the advancement is less than the orphanage share, appears from the cases before referred to. It is presumed, therefore, that since in the event of the advancement being less than the full orphanage part, the child is intitled to have the deficiency made good, so on the other hand, equality of justice requires that the child should bring in the excess of advancement before he be intitled to share in the part distributable under the statute; and the more especially, since the statute (with the exception of the heir, as to advancement, or settlement upon him of freehold estates), provides and declares, with a view to equality among the children, that children advanced by their father in his lifetime, with lands or personalty, shall bring them into hotchpot before they shall take any shares in his personal estate (*b*). With respect to authorities which may be considered as contradictory to the above observations, it is to be observed, that the decree in *Gudgeon* v. *Ramsden* (*c*) was not acquiesced

(*a*) Medcalfe v. Ives, 1 Atk. 63. (*b*) See Edwards v. Freeman, 2 P. Will. 435. (*c*) 2 Vern. 274, ed. by Raithby.

in, and upon a rehearing, the suit was compromised; and it may be inferred from the report in *Hearne* v. *Barber* (*a*), that the advancement exceeded the child's distributive share in the dead man's part under the statute, and it appears that *Lord Hardwicke* entertained a *doubt* whether the child should not bring its advancement into hotchpot before it could take under the statute; his decree, however, was in opposition to such doubt, but it seems to have been pronounced through compassion, or what was considered to be the particular hardship of that case.

What are considered to be advancements.

As to what shall be considered an advancement. It must be made in consideration of marriage, or for the promotion of the child in the world; as of money advanced at or in pursuance of marriage (*b*), or be money laid out in purchasing for the child a commission in the army, and the like (*c*).

The *heir* in respect of advancements of *personal* property is in the same situation as other children in regard to bringing them into hotchpot (*d*); but *money* laid out by the intestate in improvements or repairs of real estate which he did not absolutely part with in his lifetime to the heir, but permitted to descend to him, is not an advancement to be brought into hotchpot under the statute of distribution (*e*).

With respect to such gifts as may be properly termed *presents*, as of a gold watch, or of wedding clothes (*f*); or of money for the maintenance and education of the child, which the parent is under a natural and moral obligation to supply, viz. such, amongst others, as money to defray a son's expenses at the university, travelling expenses, money paid with a child upon

(*a*) 3 Atk. 213. (*b*) 1 Atk. 402. Hume v. Edwards, 3 Atk. 451. Jenkins v. Holford, 1 Vern. 61. (*c*) Hearne v. Barber, 3 Atk. 213. Norton v. Norton, 3 P. Wil. 317, note, ed. by Cox. (*d*) Phiney v. Phiney, 2 Vern. 638. (*e*) Smith v. Smith, 5 Ves. 721. (*f*) Elliot v. Collier, 3 Atk. 527.

placing him or her out an apprentice as a compensation for the support of the child; such and such like payments will not be considered advancements to be brought into hotchpot either under the customs or the statute of distribution (*a*).

Premiums given with children.

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a *premium* for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought in hotchpot. In allusion to this distinction, it is conceived that *Lord Hardwicke* expressed himself in *Morris* v. *Burroughs* (*b*), "I should think (said his Lordship) that if a father should give money to put a son, or advance him in life by setting him up in trade, &c. that would have the same effect," *i. e.* will be a satisfaction of the custom, or must be brought into hotchpot, as the case may happen to be.

As to lands being advancements under the customs and the statute.

When lands are advanced by a freeman to a child, or are permitted to descend to the heir, the following distinctions under the customs and the statute of distribution must be attended to.

Under the customs.

Lands descending upon the heir from a freeman of *London*, or by him given or settled upon any of his children, or money directed to be laid out in the purchase of lands (*c*), and to be settled upon any of them, are not advancements within the custom of *London*, for it only regards the *personal* estate of freemen; yet as the custom includes chattel interests, it makes a settlement of a *term* for years an advancement within its provisions (*d*).

But by the custom of the province of *York*, lands descending from the freeman upon his heir by the com-

(*a*) Hinder v. Rose, 3 P. Will. 317, note, ed. by Cox. (*b*) 1 Atk. 402. (*c*) Annand v. Honeywood, 1 Vern. 345. Stanton v. Platt, 2 Vern. 753. (*d*) 2 P. Will. 274.

mon law, or to which the heir succeeds under his father's marriage settlement, will exclude him from any filial portion under the custom (*a*), whether they be in possession or reversion, for land as well as money is an advancement within the custom. But the custom is construed strictly, and is held to apply singly to the heir at common law, and to lands only which devolve to him in that character; so that if he take them by *purchase*, as under his father's will, and not by descent, or if he inherit them as heir by Borough-English, or if the estate be copyhold, to which he succeeds as customary heir, he will in none of these instances be excluded from his filial portion (*b*).

Under the statute.

With respect to the statute of distribution, the heir may claim a distributive share of the personal estate, although he may have been advanced with lands by his father the intestate, or although real estates descended to him from his father; but lands settled by the intestate upon any other of his children must be brought into hotchpot before they will be permitted to claim distributive shares under the statute (*c*), yet lands descending upon a child not heir by the common law but heir by special custom, as upon the youngest child by the custom of Borough-English (*d*), or a devise of lands to such child by its father, who dies intestate as to his personal estate, will not exclude such child from a distributive share under the statute (*e*).

How wife barred of her interests under the customs and the statute.

II. The next consideration is how the wife may be barred of her interests under the customs and under the statute of distribution.

With respect to the widow's chamber, she will be deprived of it if the assets of the freemen be insufficient to pay all his debts; but in analogy to the rule

(*a*) Constable v. Constable, 2 Vern. 375. Swinb. part 3. sec. 18. (*b*) Ibid. 4 Burn's Eccl. Law, 465. (*c*) See 22 and 23 Char. II. cap. 10, sect. 5. (*d*) Lutwyche v. Lutwyche, Forest. 276. (*e*) 2 P. Will. 440.

which prevails in regard to the wife's paraphernalia, afterwards considered, it seems that she would be intitled to stand in the places of specialty creditors, in order to be reimbursed the value out of the intestate's freehold estates; and if it should happen that the freeman died intestate as to the articles falling within the widow's chamber, it is presumed, upon the principle of the same analogy, that although they would be liable to debts in failure of the other personal estate, yet that they would not be liable to the demands of general legatees (*a*).

Preferred to legatees.

Widow barred by statutes enabling freemen to prevent the customs by their wills.

By statutes 4 and 5 William and Mary, c. 2, explained by the 2d and 3d Anne, c. 5, for the province of *York*, the 7th and 8th William III. c. 38, for *Wales*, and the 11th George I. c. 18, sect. 17, for *London*, powers of testamentary disposition are given to persons residing in those places and districts, liable to the customs prevailing there; which powers, when exercised, defeat such customs, and consequently the claims of widows, &c.; so that questions upon the customs can at present only arise when such persons make no wills, or enter into engagements that their personal property shall be distributed after their deaths according to the customs. In those instances the rights and powers of the parties remain the same as before the passing of the above acts of parliament, which rights and powers it becomes therefore necessary to consider so far as the wife is concerned.

And by dispositions during the freeman's life if *bonâ fide*.

A freeman who has agreed that his personal estate shall be subject to the custom, may during his life make a *bonâ fide* gift or disposition of his property amongst his children or otherwise, which will bar his widow's claims under the custom (*b*). But if the transaction be merely colourable, or be accompanied with circumstances evincing fraud, the disposition will be

(*a*) 3 Atk. 369. (*b*) 2 Vern. 277.

void against her, and her rights by the custom will attach.

Thus in *Tomkyns* v. *Ladbroke* (*a*), a freeman of *London* executed a will and a deed on the same day, by the last of which he assigned 5000*l.* to trustees for his daughter's separate use. He was then of the age of seventy-two, and in bad health, and died two days afterwards. And *Lord Hardwicke* decreed that the 5000*l.* were parts of the freeman's personal estate, the case being of a very suspicious nature as to the custom, the deed not having been delivered out of the freeman's possession: the age and state of health of the freeman were also material considerations in the view of his Lordship, who considered that the deed was a testamentary act, and therefore in fraud of the custom.

Not so if made in fraud of the customs.

Evidences of fraud.

Other evidence of fraud upon the custom will appear upon reference to what has been before detailed in the first volume, upon the subject of fraudulent or voluntary settlements. Keeping the deed in the settlor's hand, or retaining possession of the property after the assignment, are marks of fraud (*b*); so also the confession of a voluntary judgment to secure the payment of a sum of money after the husband's death, &c. will be ineffectual against the widow's rights (*c*).

As retaining the deed, or possession of the property after assignment,

or confession of a voluntary judgment.

[And the reservation of a life interest in property assigned by deed, is held to be evidence that the gift is in effect testamentary, and therefore a fraud upon the custom (*d*).]

In *Edmundson* v. *Cox* (*e*), the freeman left inclosed with his will a bond, dated prior to it (and which was voluntary) conditioned for the payment to his nephew of 1000*l.* or to transfer to him 1000*l.* *stock* in the

(*a*) 2 Ves. sen. 591. (*b*) Smith v. Fellows, 2 Atk. 62. (*c*) Hall v. Hall, 2 Vern. 276. Fairbeard v. Bowers, 2 Vern. 202. (*d*) Turner v. Jennings, 2 Vern. 612. 685. Smith v. Fellowes, 2 Atk. 62. See Fortescue v. Hennah, 19 Ves. 67. (*e*) 7 Vin. Abr. 202, pl. 11.

Million Bank. And *Sir John Trevor*, M. R. determined that this bond being in the nature of a voluntary gift was fraudulent *quoad* the wife's customary share; and he said that such sort of contrivances were always set aside by the Court.

This bond carried with it a mark of fraud, and showed the intent of its execution. It was never delivered out of the obligor's possession, nor was intended so to be during his life; it was in fact an artifice to put into a nephew's pocket 1000*l.* in contravention of the custom.

Any device to defeat the custom and preserve the income of the property to the husband for his life will be met and cancelled by the Court.

When freeman's purchases of lands are held fraudulent.

Thus in *Coomes* v. *Elling* (*a*), the husband, ten years before his death, purchased a leasehold estate for forty years in the *joint names of himself and wife*, and *Lord Hardwicke* was of opinion that the lands were to be considered part of the freeman's personal estate.

His Lordship's opinion must have been founded upon this, that the transaction was fraudulent, a contrivance of the husband to dispose of so much of his personal estate after his death as he had invested, in fraud of the custom, at the same time reserving to himself the rents and absolute dominion over the estate during his life; for by the mode in which the conveyance was taken, he retained to himself the possession and the absolute power of disposal of the estate whilst he continued to live.

But if the transaction be *bonâ fide*, then if the husband purchase or agree to purchase lands, either in his own or a trustee's name, that will be good, and no fraud upon the custom, as was decided in *Ambrose* v. *Ambrose* (*b*), where a purchase was made by a freeman in the names of two trustees; in that case, although the

(*a*) 3 Atk. 676. (*b*) 1 P. Will. 321.

purchase money was mentioned in the conveyance to have been paid by one of the trustees, yet since that trustee signed a declaration of trust after the freeman's death, stating that he was only a trustee for the freeman, whose money the purchase money was, the Court held that the money was properly invested, and that the estate ought not to be considered as part of the freeman's personal estate, and therefore liable to the custom.

Investments and gifts of personal estate by freeman when *in extremis*.

In *Tomkyns* v. *Ladbroke* (*a*) *Lord Hardwicke* declared that a freeman might in his last illness lay out his personal estate in land, and admitted that a freeman might by act during his life, and *in extremis*, give away any part of his personal estate, provided he devested himself of all property in it. It appears, nevertheless, difficult to suppose even a case where such an act can be done without contemplating a fraud upon the custom. And *Lord Hardwicke* in the case referred to seems to have been impressed with the same idea; for he said, "where there is any case of such an act by a father upon his death-bed, and no evidence of actual possession or effect of possession or enjoyment during the father's life, the consideration is, *what construction* ought to be made upon the *nature* and *intent* of the act done?" The right, however, being admitted to exist, it may, therefore, be exercised; and with respect to the *intent* of the freeman, since every disposition made by him in his lifetime of his personal fortune may be considered as done with a view to defeat the custom, *pro tanto*, and yet they are good, it is presumed that the like intent in his last illness would not be permitted to vitiate the gift or disposition then made by him. Probably the following may be considered as the right conclusion upon this subject, viz. that if the act be accompanied with delivery of the

Probable rule as to their validity.

(*a*) 2 Ves. sen. 593. See also 1 P. Will. 532, and Frederick v. Frederick, 1 P. Will. 719.

property, and every thing is done (so far as it can be, before the freeman's death intestate) to give effect to the transaction, and there is no reservation, and the freeman devests himself of all interest in the property, then the act will be necessarily valid, as a due exercise of his admitted right, whilst life remained, to dispose of his property in bar of the custom.

Bar of widow's customary rights by settlement.

The widow's rights under the customs may be barred by the purchase of them by settlement previously to the marriage (*a*).

In *Medcalfe* v. *Ives* (*b*), *A* and *B* his wife before their marriage covenanted in articles of settlement in consideration of her portion of 2000*l.* to release all the right and interest which might accrue to them out of her father's personal estate by the custom of the city of *London*. *B* was under age, and *Lord Hardwicke* decided that the husband being alive was bound to perform the covenant, observing that according to *Judd*'s law a husband is authorised to agree with the father for the wife, although she be under age. His Lordship, therefore, decreed that the husband was barred of any customary share in right of his wife, *or otherwise* in the personal estate of the father.

A settlement of *personal* estate presumed to be in bar of widow's share under custom of London.

It seems from the custom of the city of *London*, as certified in the case of *Lewin* v. *Lewin* (*c*), that when the provision for the wife by settlement is of *personal* estate, although nothing appears from the settlement that her customary rights were then in contemplation, yet that they will be presumed to have been so from the nature of the property settled, so that she will be precluded from claiming *part* of the *same* estate by settlement, and *another* part of that estate by the custom.

(*a*) Hancock v. Hancock, 2 Vern. 665. Blunden v. Barker, 1 P. Will. 634. Love's case, 1 Vern. 6. (*b*) 1 Atk. 63; see also 1 P. Will. 531. (*c*) 3 P. Will. 15.

But this presumption may be repelled by the terms of the settlement.

Thus, in *Kirkman* v. *Kirkman* (*a*), the husband's father, in consideration of the wife's portion of 5000*l.* being paid to him, assigned to the husband all his share in a partnership, and covenanted that he would, at his death, give or leave 5000*l.* to the husband, to be applied as therein mentioned, and that in the event of the wife surviving her husband, then that the husband, or his surviving partners, should pay to the trustees 10,000*l.* for the wife's use, as therein stated, with liberty for her to continue the money in the trade to the end of the partnership; and it was *declared* that nothing therein before contained, nor the provision thereby before made for the wife, out of the husband's personal estate, should be in any wise construed to bar or deprive her of her right to dower, or thirds, at common law, or by any law, *custom*, or usage whatsoever, out of all such real estate as the husband should become seised or possessed of during his life, nor to bar or deprive her taking any other gift, provision, or bequest, which he should think fit to give, leave, or make to or for her, by will, deed, gift, *or otherwise in any wise whatsoever.* The marriage afterwards took place, and the husband became a freeman of *London*, and died intestate. The questions were, whether the settlement barred the wife, who survived him, of her claims under the custom and the statute of distribution? And if not, then, whether the 10,000*l.* or 5000*l.* part of it, to which the wife was absolutely intitled under the settlement, were satisfied by what she took under the custom and the statute? or if not, then whether she ought not to bring into hotchpot one of those sums? And *Lord Thurlow* decided in favour of the wife upon all these points, observing, that it was the inten-

(*a*) 2 Bro. C. C. 95.

tion of the proviso that the covenant should not bar her from any effect of the husband's success.

And when the settlement is of *lands*, widow's customary rights, or those under the statute, will not be barred except it be so expressed.

But since the custom of *London* does not apply to *real* estates, when, therefore, the settlement or jointure upon the wife is made of or out of lands, it is necessary, in order to make the provision a bar to the widow's claims under the custom or the statute of distribution, that the contract or intention to do so should appear from the deed, and what has been before detailed, in relation to the husband's purchase by settlement of his wife's *choses in action* (*a*), applies to the present subject.

In *Babington* v. *Greenwood* (*b*), *Lord Parker* clearly held, that a jointure of *land* made by a freeman of *London* upon his wife, *if expressed* to be in bar of her customary part, would have that effect; but that, *if it were not* so expressed, and only said to be in bar of her dower, that would be no bar of her customary part, because land, or a real estate, is of a quite different nature from personal estate, and a matter wholly out of the custom of *London*.

The reason why the wife shall be barred of dower only (*c*), when that right alone is mentioned in the settlement, is this; she stipulated to part with, and the husband to purchase no other interest than that expressly mentioned. Upon the same principle, if, by the deed, she purport merely to give up her rights to dower and the custom in consideration of a jointure, that provision, upon the husband's intestacy, will be no bar to her title to a share in the dead man's part under the statute of distribution (*d*).

(*a*) *Ante*, vol. i. p. 289, *et seq.* (*b*) 1 P. Will. 530. (*c*) Atkins v. Waterson, 1 Eq. Ca. Abr. 157. pl. 5. Gilb. Eq. Rep. 94.

(*d*) If it appear from the instrument, though not expressly declared, that the settlement made on the wife was intended to be accepted in lieu of the provision which the law gives her, in the event of surviving her husband, it will be sufficient to exclude her from

The following is an instance where the terms of the settlement excluded the wife from both her rights by the custom, and under the statute.

Instance of a settlement barring widow of dower, thirds, and her customary share.

A, in consideration of marriage with *B*, settled lands in jointure upon her in full recompense of *dower*, and of *all demands* she might make to his personal estate by the *custom* of the province of *York or otherwise*, provided, that if she after his death claimed, or recovered any part of his personal estate, by the *custom*, or *any other means* whatsoever, the trustees were to be seised of the jointure lands, to indemnify the persons injured by the widow's claims of dower, thirds, or any part of his personal estate. *A* died intestate, and *B*, his widow, administered to him; and it was decreed, that as the intent was plain to exclude *B* wholly from the personal estate, she could not claim any part of it, and that her taking administration was in violation of the settlement (*a*).

Widow's election.

When the provision for the freeman's widow is made *after* marriage, it will be left to her option, after the death and intestacy of her husband, whether she will accept it, or her customary and distributive shares;

her distributive share under the statute, as well as from dower. Thus Lord Hardwicke thought if the settlement was expressed to be for making some provision for the wife if she survived, or for her livelihood and maintenance, it would bar her from any demand as widow. Walker v. Walker, 1 Ves. sen. 54. And though in Couch v. Stratton, 4 Ves. 391, the expression "for making some provision" was not held to bar the wife of dower, yet in the subsequent case of Garthshore v. Chalie, 10 Ves. 1. where the language was similar, the Lord Chancellor seems to have been of opinion, that what was given by the settlement must be taken to be the provision which in every view the wife was intended to have, as between her and her husband and his representatives. But though general expressions of this kind may raise an inference, that all her rights as widow were intended to be satisfied, that inference may be controuled by a declaration that the settlement is in lieu of part of those rights, as in Babington v. Greenwood.

(*a*) Benson v. Bellasis, 1 Vern. 15.

the amounts of those shares being first ascertained, in order that she may fairly exercise her right of election, as has been before observed upon that subject (*a*). And when the freeman disposes by will of his property (as he is at liberty to do under the statutes before referred to), and he bequeaths part of it to his widow, already provided for out of real estate, by settlement; whether the wife will or will not be put to her election between her provision and the benefits under the will, depends upon the terms of the will, and the intention of the testator; and the question must be decided according to those general principles that govern other similar cases, and which are collected under the title "Election," in the "Law of Legacies (*b*)".

Distinction to be noticed when widow is barred under a *settlement* before marriage, and when the provision in bar is by the freeman's *will*.

But there is one particularity which must be noticed, viz. that in the instance of the widow's title under the statute of distribution, whether the husband die intestate, or dispose of his *personal* estate by will, which fails by lapse, if the wife be barred of her distributive share by *settlement* before marriage, she will be equally excluded in favour of the next of kin as of the particular legatee. This, however, is not the case when the husband by *will* makes provision for his wife, stating it to be in lieu and bar of all her claims upon his personal estate, and then disposes of his personalty, and such disposition lapses, or is void, so that the fund becomes the property of his next of kin; the bar created by the will, in favour of the legatee, will not be considered as extending to the next of kin; therefore, notwithstanding the expressions in the will, the widow will be intitled to a share under the statute of distribution (*c*). The principle of the distinction is this, that where a woman has agreed before marriage to accept a consideration

(*a*) Vol. i. p. 600. (*b*) 2 Vol. pp. 404, 454, 459, 460, 463, 2 Ed. See also, *ante*, vol. 1. chap. xi. p. 565, *et seq.* (*c*) See 10 Ves. 17, 18.

for her widow's share, she is bound by her contract, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the freeman's will, it is presumed that the motive for the widow's exclusion originated in a *particular* design or purpose of the testator, viz. for the benefit of the person in favour of whom the property was bequeathed by him, so that if the purpose be disappointed there is no reason why the bar or exclusion should continue. *Lord Alvanley* found this principle recognised by *Lord Cowper*, in *Sympson* v. *Hutton* (*a*), which he stated from the registrar's book, to the following effect.

Thomas Addison, by will, reciting that he had once intended to have made his daughter *Jane* coheiress and equal sharer with his other daughter, but that she having married without his consent, therefore gave her certain provisions out of his real and personal estates; all which he declared to be in satisfaction of her child's part of whatsoever more she might have expected from him, or out of his personal estate: he then devised to his wife; and gave her furniture and other things, all which devises and bequests he declared to be in full of her dower, thirds and other claims at law or in equity, or by any local custom, to any other part of his real or personal estate. He gave the residue to his other daughter, who died in his lifetime, leaving one child, who was the only person that could be intitled, under the statute of distribution, besides the wife and the excluded daughter. By a codicil, he gave the residue to his wife for life, with power to dispose of it after her decease, with the approbation of the trustees. Having this limited power, she made a disposition without the consent of the trustees. The decree declared, that

(*a*) 3 Ves. 335. 11 Vin. Abr. 185, pl. 14, 16. 2 Eq. Ca. Abr. 439, pl. 35, S. C.

Frances, the widow, having disposed without the consent of the trustees, had not pursued her power, and that therefore the testator died intestate as to the residue, which ought to go according to the *statute of distribution*, viz. in thirds, one-third to the plaintiff, *Sympson*, in right of his wife *Jane*, one-third to the child of the deceased daughter, and one-third to the devisee of the widow.

Upon the authority of the above case, *Lord Alvanley* decided *Pickering* v. *Lord Stamford* (*a*). There the testator bequeathed his residuary personal estate to his executors, to be applied to such *charitable* uses as they thought proper. Parts of this fund consisted of real securities; so far, therefore, the bequest was void under the statute of *mortmain*, and such parts of the residue were a resulting trust for the testator's next of kin. A question arose, whether the widow was not excluded from her share under the statute of distribution, since the testator had devised to her parts of his real and personal estates in satisfaction of all dower or thirds which she could have or claim in, out of, or to all or any part of his real and personal estates, or either of them. The solution of this question depended upon the fact whether the testator was to be considered as intending to bar his wife of her dower, &c. generally, and against all persons in every event, or merely in favour of the charitable bequest. If with the latter view and purpose only, then as to so much of the residuary fund as could not be so applied, the widow would, notwithstanding the will, be intitled to a distributive share with the other next of kin, under the statute of distribution. The bequest to the charity was by a codicil, and revoked the testator's will, by which he had given his residuary estate to four persons for their own benefit. *Lord Alvanley*, upon a re-

(*a*) 2 Ves. jun. 272. 3 Ves. jun. 332.

hearing, and after great consideration, altered his former decree, and decided in favour of the widow, declaring, that so much of the testator's residuary personal estate as was vested in real securities was divisible according to the statute of distribution, viz. one half to the widow, and the other to the next of kin, as in *Sympson* v. *Hutton*. It appears then, that the foundation of his Honour's decree in the last case was, that the exclusion of the widow's claims upon the testator's residuary personal estate was merely intended for the benefit of the persons to whom such estate was expressly given by the will, and that it was not meant to extend the exclusion farther, viz. in favour of persons succeeding to the property by lapse or otherwise. *Lord Alvanley*, in his first decree, by which he determined against the widow, appears to have been misled by the analogy between this case and those cases that have been decided upon the custom of *London;* for he said, "When this cause was first argued, I thought it was one of great nicety and difficulty, but upon consideration then given to it, and the authority of those cases which were much relied upon by the next of kin respecting the custom of *London*, that where a widow had agreed to accept a consideration for her widow's share, *although her husband dies intestate*, yet she would *not* be at liberty to claim her widow's share, I was led to think the same doctrine would apply to the case where, *not with a view to guard against intestacy*, but by some provision, he had put her in the same situation of a contract before marriage, and that it would be a bar, let the circumstances under which the claim might arise be what they might; but now, upon rehearing, I am decided by having the very point determined by *Lord Cowper*, who was of opinion, in the case (*a*) I have cited from the registrar's book, that

(*a*) Sympson v. Hutton, *supra*.

where a testator had given to his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow."

Settlements on marriages of infants.

[It has been seen, that a female infant may be barred of her right to a distributive share of her husband's personal estate, by a settlement made before marriage with the approbation of her parents or guardians (*a*). A settlement on the marriage of a female infant will also bind her personal estate, whether consisting of property which would upon the marriage vest absolutely in the husband, or of choses in action or leasehold estates which would survive to her, if not reduced into possession, or assigned by the husband (*b*). On the other hand, it is now held (*c*), after considerable fluctuation of opinion (*d*), that a settlement on the marriage of a female infant will not bind her real estates.

In many of the earlier cases an opinion prevailed, that parents and guardians had a general authority to bind the property of infants, by agreements on their marriage; and that agreements of this nature were to be in all cases established, if fair and reasonable. This opinion, which in a great measure influenced the decision of *Drury* v. *Drury*, has been shaken by the cases which have settled that the infant's real estate cannot be bound; and the principle upon which the personal property is now held to be bound, seems to be

(*a*) *Ante*, vol. i. p. 479. (*b*) Harvey v. Ashley, 3 Atk. 607. Trollope v. Linton, 1 Sim. and Stu. 477. (*c*) Durnford v. Lane, 1 Bro. C. C. 106. Milner v. Lord Harewood, 18 Ves. 259. Trollope v. Linton, *ub supra*. (*d*) See Cannel v. Buckle, 2 P. W. 243. Harvey v. Ashley, *ub supra*. Lucy v. Moore, 4 Bro. P. C. 343. ed. Toml. May v. Hook, Co. Litt. 246 *a*, note. Peirson v. Peirson, cited 1 Bro. C. C. 115. Clough v. Clough, Wooddeson, vol. iii. p. 453. 3 Ves. 710.

that the marriage vests it in the husband, or places it under his controul, and that it therefore becomes subject to the covenants entered into by him in the articles. Thus in *Williams* v. *Williams* (*a*), the husband had reduced the personal property into possession, and *Lord Thurlow* held that it must be applied on the trusts of the settlement, "the husband having covenanted, that what should come to him should be bound by the articles (*b*)." Upon this principle it seems that the settlement would not, in the event of the wife surviving, be binding on her, with respect to any reversionary or contingent interests, which could not vest in the husband, or which did not come within his power during the coverture (*c*). On the same principle, if the settlement, so far as relates to the personal property of the wife, derives its effect from the covenant of the husband, the assent of the parents or guardians will not be in all cases indispensable (*d*).

With respect to a marriage settlement of a female infant's real estate, though not binding upon her, it will be binding on the husband, and will therefore prevent him from joining in any other disposition of the estate during the coverture (*e*). It will also, upon the principle of election, become obligatory upon the wife or her heirs accepting other benefits under it (*f*).

If the husband be an infant at the time of the marriage, it may be presumed, for the same reasons which apply to the case of a female infant, that a settlement of his real estate would not now be held to bind him: there are two cases in which a different view of the question appears to have been taken (*g*), but it is pos-

(*a*) 1 Bro. C. C. 152. (*b*) See also 5 Madd. 164. 1 Sim. and Stu. 485, and 1 Ves. sen. 377. (*c*) See Medcalfe v. Ives, 1 Atk. 63. Bush v. Dalway, 1 Ves. sen. 19, 3 Atk. 530, and 1 Bro. C. C. 111. But see 3 Atk. 613. (*d*) 1 Bro. C. C. 111. Vide *ante*, vol. i. p. 486. (*e*) Durnford v. Lane, *ub supra*. See 18 Ves. 276. (*f*) 18 Ves. 276. 1 Bro. C. C. 111. See 3 Atk. 613. (*g*) Strickland v. Coker, 2 Ch. Cas. 211, cited 3 Atk. 614.

sible that they may have turned upon acts confirming the contract done by the husband when of age.

The principle on which the validity of marriage settlements of the personal property of female infants appears to rest, does not apply to similar settlements of the personal property of male infants (*a*).]

Warburton v. Lytton, 1764, cited in Lytton v. Lytton, 4 Bro. C. C. 440. See Slocombe v. Glubb, 2 Bro. C. C. 545.

(*a*) The cases relative to settlements on the marriages of wards of the Court of Chancery have been referred to, *ante*, vol. i. p. 267. Since that part of the work was printed, a note of a case has appeared, in which the Lord Chancellor is reported to have expressed an opinion, that the jurisdiction of the Court to regulate the settlement continued so long as the property remained in Court, though the ward married after attaining the age of twenty-one years. Austen v. Halsey, 1 Sim. and Stu. 123, note. In Long v. Long, ibid. 119, a postnuptial settlement of a fund in Court was held void as against the wife surviving, the fund not having been reduced into possession, having remained in Court till after the husband's death.

CHAPTER XIV.

OF THE HUSBAND'S COVENANTS TO LEAVE, OR SETTLE UPON HIS WIFE PERSONAL ESTATE; AND OF THE PERFORMANCE AND SATISFACTION OF SUCH COVENANTS; AND OF HER TITLE UNDER THE DESCRIPTION OF NEXT OF KIN TO HER HUSBAND.

THE wife may acquire an interest in her husband's personal estate, from his covenant or agreement to settle part of it upon her, or that he will leave, or that his executors shall pay to her a portion of it; or that she shall have all the personal property of which he should be possessed during the marriage, or which he should leave at his death. I propose to consider the subjects of this chapter in the following order:—

I. *The husband's covenant or agreement to settle all the personal estate that he was possessed of when the marriage articles were entered into.*

II. *The construction of his covenant to bequeath or settle all the personal estate which he should be possessed of during the marriage, or should leave at his death.*

III. *What would be a* performance *of his covenant or agreement to settle, or to leave, or that his executors shall pay to his wife a portion of his personal estate.*

IV. *Of the* satisfaction *of such a covenant or agreement. And*

V. *Of the wife's interest in such personal estate as by settlement, covenant, &c. was limited, or given, or agreed to be limited to* her *husband's* next of kin, *&c.*

I. The construction of the husband's covenant or agreement to settle all the personal estate, of which he was possessed when the marriage articles were entered into.

When husband covenants to settle *all* his personal estate at the date of the marriage-articles, it is bound from such period. And if invested by him in lands, *semble* that the estate will be the heir's, charged with repayment of the trust money.

It sometimes occurs that a husband previously to his marriage covenants or otherwise engages to convey or settle in favour of his wife, or of her and their children, all the personal estate which he was possessed of at the time of executing articles of settlement. The effect of this covenant is, to change the ownership of the property from the execution of the articles, and the husband ceases to have any interest in it from that period. In such a case, if the proceeds of that estate be afterwards laid out by the husband in the purchase of *real* property in his own name, or otherwise, without reference to the trusts subsisting under the articles, the money so laid out may be followed and demanded out of the real estate for the benefit of the persons intitled to it under the articles, but subject to such a lien or charge, the estate itself (as appears to be the better opinion) will after the husband's death be considered in equity as belonging to his heir or devisee.

In one case, however, which arose upon articles of the above description, the specific lands purchased with the trust money were considered as belonging to the *cestuique trusts* under the articles, and were decreed to be conveyed accordingly. This was the case of *Randall* v. *Willis* (*a*), in which the articles were to have effect by attaching trusts upon that which was the personal estate of the intended husband at the date of such articles, or which should be so at the end of three months after the marriage (*b*). The articles being in

(*a*) 5 Ves. 262. Reg. Lib. B. 1799, fo. 454.

(*b*) The covenant was, that the husband should within three months after the marriage convey, release, surrender, and assure certain estates to the uses therein mentioned, "and also all and singular his personal estate of what nature and kind soever." This

consideration of marriage, what was agreed in them to be done was considered in equity the same as actually and properly completed by conveyance and assignment. From the date of the articles, therefore, the personal estate which the husband *then* had was subjected to the trusts of the settlement. But a settlement was executed after the marriage, which was not considered to have been prepared in conformity with the articles, since such settlement did not contain a covenant to prevent the husband from laying out his personal pro-

covenant was spoken of in Lewis v. Maddocks, 8 Ves. 150, as one which attached upon the personal estate of which the husband was then possessed, or of which he might be possessed, within the three months. But from the judgment of the Lord Chancellor, it appears that he put a different construction upon it; he thought that it obviously could not mean that there should be a specific settlement of every article of personal estate, that, within the period allowed for making the settlement, the husband might be possessed of. His Lordship's view of the meaning of the covenant appears to have been, that it applied to the residue of the personal estate of which the husband should be possessed at his death; but that in order to prevent him from disappointing its object, the settlement made in pursuance of the articles ought to have contained a proviso, that any real estate which he might purchase should be considered as personalty for the purpose of the settlement, 5 Ves. 274. If this view was correct, it followed that any estates which the husband had purchased were to be treated in the same manner as if the settlement had contained that proviso. The language of the decree is not strictly conformable to the opinion expressed by the Court: this may perhaps have arisen from the frame of the Bill, the prayer of which extended only to lands purchased with the personal estate of which the husband was possessed at the date of the articles. The decree does not, however, adopt the notion that the covenant attached upon all the personal estate at that time: for on that supposition it would have been declared that the widow was to stand as a creditor for so much of the personal estate of which the husband was then possessed, as had not been laid out in land. The decree, however, proceeds to direct the usual accounts of his personal estate possessed by his executrix, and of his debts, apparently on the idea of the widow being intitled under the covenant to the residue of his personal estate at the time of his death after payment of his debts.

perty, articled to be settled, in the purchase of lands; nor a covenant by him, that whatever part of such personal property should be so invested, the land purchased with it should be considered as his personal estate. The husband died; but in his lifetime he invested the proceeds of the personal property in the purchase of lands which he devised by his will. Upon a question between his surviving wife and the devisee, the Court of Chancery, after declaring the personal estate which the husband was possessed of at the time of the articles, and had been invested in the purchase of lands, to be subject to such articles, ordered the *specific* lands so purchased to be conveyed to the wife, and directed an account of the rents which had been received by the husband's devisee.

This decision, however, as an authority may be reasonably doubted, since the foundation for the decree must have been a *lien* which the widow was supposed to have had upon the purchased estate in consequence of the covenant; but this supposition does not appear to be well grounded; for such a lien, it would seem, could only be established upon the basis of an obligation in the husband to have laid out the money in the purchase of lands; and then, as we have seen (*a*), the law would presume that the estate was purchased in performance of such obligation. But in this case there was no covenant by the husband to invest it in lands; no stipulation in the articles for that purpose; so that there could be no presumption to create a lien upon the lands in favour of the wife. The only other pretence for it is, that the purchase was made with the trust money. But the mere consequence of this would be, as is presumed, to give a right to the widow to follow the trust fund into the estate in which it was invested, according to the observation of *Sir William*

(*a*) *Supra*, vol. i. p. 509.

Grant in *Lench* v. *Lench* (*a*). *Lord Eldon* seems to have found great difficulty in reconciling the judgment in *Randal* v. *Willis* with the opposite decree which he pronounced in *Lewis* v. *Madocks* (*b*); the distinction, however, that his Lordship laboured to make between the principles of the two cases (and which will be noticed in the next section), is a difference that is conceived to be difficult to comprehend, since, according to the principle of the case of *Randal* v. *Willis*, trust-money fixed and ascertained, or capable so to be, at the time of marriage articles, if laid out in the purchase of lands by the husband, without any obligation so to do, gives a right to those lands to the *cestuique trusts*, and why there should be a difference when such money accrues from time to time (if that decision were right), it is not easy to understand, since in such case the trusts of the settlement equally attach; in the one immediately upon the execution of the instrument, and in the other immediately as each sum is acquired, so that the inference would be, that if in the one case the *cestuique trusts* were intitled to the estate purchased with the trust funds, they would be so intitled in the other.

With respect to the liability of personal estate of the husband to his creditors, which is so agreed to be settled upon his wife, as in *Randal* v. *Willis*, it does not appear from the decree in that case whether such creditors were intitled to have their demands satisfied out of any part of the trust estate, bound by the articles. It is conceived, however, that since the articles bound all such personal property as the husband was intitled to at their execution, and as they were entered into for a valuable consideration, such property ceased to be the husband's from the date of those articles and the celebration of the marriage, and that neither his cre-

(*a*) 10 Ves. 511—517. (*b*) 8 Ves. 150. 17 Ves. 48.

ditors before nor subsequently to the articles could subject any of the property contained in them to their debts (*a*).

Construction of husband's covenant to settle *all* the personal estate he should be possessed of during the marriage.

II. The next subject proposed for consideration was, the construction of the husband's covenant to bequeath or settle all the personal estate which he should be possessed of during the marriage, or should leave at his death.

1. The reader will have noticed that the case of *Randal* v. *Willis*, mentioned in the last section, differs from the subject now under consideration in this respect, that the agreement was confined to the personal estate which the husband was possessed of at the execution of the articles, or within three months after the marriage, but that in the present instance the agreement embraces all the personal property which the husband should have or acquire during the marriage. Whether this extension of the agreement makes any difference between the two cases in regard to the equity of the widow, against the heir or devisee of her husband, to have the *specific* lands in which the trust-personal estate was invested by him without any obligation so to do, has also been noticed. I shall now observe that it has been decided since the case of *Randal* v. *Willis*, and rightly (as it would seem) upon principle, and by which decision the authority of that case seems to be shaken, that where the husband agrees, in contemplation of marriage, to devise, convey, or assure to his wife all the personal estate and effects that he, during the marriage, shall become possessed of, and he purchases lands with the property subjected to his marriage contract, and dies, such lands will belong to the heir, *charged* with the amount of the purchase-money in favour of the wife (*b*).

Upon this subject *Lord Eldon* expressed himself as

(*a*) Campion v. Cotton, 17 Ves. 263. Sed vide 10 Ves. 20.
(*b*) See Lane v. Dighton, Ambl. 409.

follows, in *Lewis* v. *Madocks* (after stated): "the claim of the wife is put in this way, that personal property bound by the trust or obligation is traced into the purchase of real estate, which estate must therefore be hers. But I do not know of any case in its *circumstances* sufficiently like this, to authorize me to hold that doctrine. I am prepared to say, that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate; that the estate is chargeable with it, but that it was not so purchased with it that the estate should be decreed to belong not to the heir but to the wife."

In stating the circumstances, which his Lordship considered as distinguishing that case from *Randal* v. *Willis*, he observed, that in *Lewis* v. *Madocks* the covenant was to settle all the personal estate that the husband should at *any time* be possessed of, attaching upon each article which he had, and that *from time to time* he should become possessed of; but that in *Randal* v. *Willis*, the articles subjected to the settlement the husband's personal estate which he had at the *date* of such settlement, and not any part to be acquired afterwards; his Lordship, therefore, decided in *Lewis* v. *Madocks*, that the husband's heir, and not his widow, was intitled to the real estate, charged, however, with the amount of the personal estate laid out in the purchase of it.

It seems, indeed, difficult to distinguish in principle the last case from that of *Randal* v. *Willis* (as was observed in the last section), which, in giving to the widow *specific* lands purchased with the husband's personal estate, agreed to be settled, instead of charging them in the hands of the devisee with the payment of the amount (according to the doctrine laid down in other cases, and recognised by the Master of the Rolls in that of *Lench* v. *Lench*, already referred to), must, it is conceived, be regarded as an anomalous case.

What personal estate subject to such a general covenant.

It is necessary to consider what power remains with the husband over his personal estate, after entering into so loose and indefinite a covenant as that in *Lewis* v. *Madocks*. That depends upon the construction of the covenant as to what personal property it attaches, when the parties themselves have been silent upon the subject. Such a covenant is very difficult to execute, yet a Court of Equity will perform it so far as it is able. When it finds a solid subject of personal estate during the marriage, it will attach it to the covenant, rather than render such covenant altogether nugatory. But to expect that a Court of Justice, in the construction of such a covenant, should descend to the *minutiæ* of every petty receipt and expenditure of the husband during the marriage for the purpose of binding them by the contract, would be unreasonable. The covenant, however, will be considered as embracing every species of personal property which the husband shall become possessed of during the coverture, falling under the denomination of principal or *capital*, but not *income* arising from capital, expended by the husband in the usual mode of applying such species of property, as for the support and comfort of himself, wife, and family, and in the discharge of debts contracted for those purposes. *Lord Eldon* accordingly observed, during the argument of the case of *Lewis* v. *Madocks* (*a*), "that he could not adopt the construction that *annual produce*, for instance, dividends of stock, was property acquired during the coverture in the sense of the bond, *except* only to the extent in which the husband himself might think proper to lay up that produce as capital, otherwise that he and his wife would not be at liberty to expend one shilling." From this exception it is to be inferred that annual *income* expended otherwise than in the usual and cus-

Capital.

Not income, except laid up or applied as capital,

(*a*) 17 Ves. 55.

tomary manner, as above, will not be exempted from the operation of the covenant, as if it be applied in the discharge of *gross* sums of money which the husband had borrowed; because those sums from their nature being to be considered as *capital* received by him during the coverture, and therefore within the compass of the covenant, the money of the husband applied in their discharge, must be considered as partaking of the nature of the debt liquidated, and treated by him as *savings* and capital. Savings from income, therefore, may form capital, and for that reason be comprehended within the terms of the covenant; and to that effect *Lord Eldon* expressed an opinion in *Lewis* v. *Madocks*, observing that if a sum of 500*l.* which had been borrowed and discharged by the husband, had been paid by him out of his savings, his Lordship was of opinion that such sum *primâ facie* would be personal estate within the husband's agreement, as having been applied in paying debts (*a*).

as in payment of money borrowed.

Savings.

Since money borrowed is to be taken as personal estate acquired by the husband during the marriage, within the terms of this his covenant, suppose the husband to take up money upon his personal security, and to invest it, with part of his own, in the purchase of lands, if he afterwards discharge the money lent to him, his widow will be intitled to reimbursement out of the purchased estate, with *interest* from his death; or if it remain unpaid at his death, it would seem that she is intitled to have it discharged out of the real estate. In such cases, who is to satisfy the claim of the creditor, is a question between the widow and her husband's heir or devisee. Upon this point *Lord Eldon* put the following case in that of *Lewis* v. *Madocks* (*b*): "Suppose the husband, possessing 600*l.*, had borrowed 600*l.*, and bought an estate of the value of 1200*l.*, and died

Semble, if husband borrow money on personal security, and invest it in purchasing land, if he repay it, the estate must reimburse his widow, with interest.

(*a*) 17 Ves. 58. (*b*) 8 Ves. 157.

So also if it continue unsatisfied;

that moment. If the former sum be to answer for the money borrowed, the wife gets nothing by the covenant under such circumstances. I incline to think that the money borrowed must be considered personal estate of which he was possessed. At least that point is fit for discussion, that the husband having borrowed the money, became possessed of it; that all which he had possessed became subject to the uses of the settlement, but as personal estate; and then the widow would with propriety be called upon to pay the 600*l.*, for she would have the other for her own benefit."

and the principle seems equally applicable when the money borrowed is secured upon the estate.

The subject last considered was the equity of the widow under the covenant, as against the husband's heir or devisee, when part of the money invested in the purchase of lands was borrowed upon his *personal* security, and afterwards paid off by him before his death, or left by him subsisting at that period. But it may be asked, whether the nature of the creditor's security will alter that equity? And it is presumed that it will not. In the first case, it is conceived that the personal estate of the husband applied in discharging such security (suppose it to be a mortgage of the estate), ought to be made good out of the property purchased, since such personalty was bound by the prior covenant or agreement of the husband to make the settlement; and, in the second case, that although the mortgagee should obtain payment of his debt out of the husband's personal assets bound by the covenant, yet that in equity the widow would have a right to be refunded out of the lands purchased the amount of the personal estate so applied.

The most of what has been said during the preceding observations are results drawn from the case of *Lewis* v. *Madocks* (*a*), in which the husband, by his bond previously to marriage, engaged to devise, convey, or

(*a*) 8 Ves. 150. 17 Ves. 48.

assure all such goods, chattels, personal estate, and effects that he at any time during the joint lives of himself and his then intended wife should be possessed of, to their joint use, and to the use of the survivor of them for ever. He, after the marriage, purchased lands for 1600*l.*, which sum was made up of 600*l.* his own money, and the residue, viz. 1000*l.*, with 21*l.* for the expenses attending the purchase, he borrowed upon his own personal security. Of the 1021*l.* borrowed, the husband discharged 500*l.*, and died, leaving 521*l.* unsatisfied. He also, during his life, expended 600*l.* in building a dwelling-house, and in lasting improvements upon the estate. His widow and executrix paid about 186*l.* in discharge of his remaining debts, funeral and testamentary expenses; and she, before a second marriage, laid out 353*l.* in repairs and lasting improvements upon the purchased lands, and in redemption of the land-tax; into the possession of which lands she had entered upon her husband's death. The husband's personal estate at his decease was 573*l.* *Lord Eldon* decided that the 600*l.*, the husband's own money, and the 500*l.* borrowed, but afterwards paid off by him, were on the same footing, and were to be considered as his personal estate laid out, and that the remainder of the sum borrowed and not discharged was to be considered the debt of the purchased estate; that as to lasting improvements made by the widow, since the money advanced by her on that account was *bonâ fide* laid out, she was intitled to an inquiry as to it; and with respect to the 186*l.*, his Lordship held, that such sum did not fall within the obligation, observing, "that a great proportion of the debts, about 186*l.*, consisted of such particulars, as, in the ordinary course of living in the last year of a man's life, he would incur, with the exception of some small *quit rents*, but which also would be due from him in the course of a proper application of his income, and that they and such particulars could hardly be represented as *debts incurred*, so as

that the payment of them would be a breach of the husband's obligation under the bond; that it would be entering into impracticable minuteness to give the wife credit against the real estate for any of the items paid in that schedule;" and his Lordship concluded with the observation "that if persons would enter into an engagement so difficult in construction and application, they must not expect from a Court of Justice relief so minute in that respect." The final decree declared that the widow was intitled to the 600*l.* and 500*l.*, with *interest* from her husband's death; and inquiries were directed as to other matters.

2. The construction of the husband's covenant that his wife shall have, or that he will leave to her the whole or part of the personal estate which he should be possessed of or intitled to at his death.

Covenant by husband to *leave* all his personal estate at his death to his wife.

To what property it attaches.

How defeated.

The property to which such covenant attaches is the whole or a proportion of the *clear* personal estate of the covenantor at his death, *i. e.* upon the residue after payment of all his debts and funeral expenses. It differs so far in effect from the preceding covenant, that the husband is at full liberty during his life to sell, alien, dispose of, or incumber the whole of his personal estate, and utterly to defeat his covenant; yet his engagement is quite consistent with this construction; it only stipulates that the whole or part of that which can be considered his personal property shall be subject to its operation, which is only so much as may remain after all his other *bonâ fide* obligations shall have been satisfied (*a*).

In *Cochran* v. *Graham* (*b*), a deed, executed upon a separation agreed upon between husband and wife, contained a proviso, that if she survived him, and they were at that time living apart according to the instrument, then that she should be intitled to receive her

(*a*) 10 Ves. 20. (*b*) 19 Ves. 63.

dower; and thirds of all the real and personal estates whatsoever of which he should die seised or possessed during the marriage. They lived separate until the husband's death, who by *will* bequeathed to her one shilling only, and disposed of the whole of his personal property, and appointed executors. A question arose upon the construction of the proviso, viz. whether it was an absolute agreement of the husband to leave his wife such a portion of his personal estate as she should be intitled to under the statute of distribution, if he had died intestate, or merely to place her in the same situation, in regard to her dower and thirds, as if she had not been living apart from him; for if the former was the construction, then she would be intitled to her distributive share of his personal estate notwithstanding the will. But *Lord Eldon* decided, that the meaning of the clause was no more than that, living separate, she should stand precisely in the same situation as if not living apart, with regard to dower and thirds, and consequently that if there had been no separation, since the husband might have barred her interest under the statute by his will, he might equally do so, notwithstanding the terms of the proviso. His Lordship also observed, that if the covenant could be considered as one to leave her such portion of her husband's personal estate as above, he might have spent all his substance, but could not have reserved to himself for his own benefit any part of that which was the subject of such a covenant.

Husband cannot defeat his covenant by will;

It appears, then, that the husband has the complete ownership and power over his personal property, notwithstanding his covenant; but the exercise of that power must be by a complete act in his lifetime, and not by his will (*a*), because the covenant takes precedency of the will, and such a disposition would be con-

(*a*) 19 Ves. 71.

sidered a fraud upon his engagement, in analogy to the rule applicable to the like dispositions by a freeman of the city of *London*, of his personal estate in opposition to his agreement, that it should be distributed according to the custom, which has been before considered (*a*).

nor by an incomplete act during his life. But there must be a total change of property.

But the husband's disposition of his personal property, in his lifetime, must be complete, an entire departure with all his interest in it, in order to prevent the transaction being set aside as a device to elude his covenant. In requiring this total change of property, the law appears to be strict; for against the husband's diminution of his estate by absolute gift during his life, in fraud of his engagement, the law considers his own interest and convenience a sufficient guard; but it does not draw the same inference or conclusion when, without any diminution of his own enjoyment, he exercises a mere posthumous bounty, although by an irrevocable instrument. The spirit of the covenant requires, that every disposition by him of his personal estate should be excluded, which is in effect testamentary, although not such in form. The gift, therefore, or other disposal by the husband of his personal estate, after entering into such a covenant as that under consideration, ought to be absolute and entire; he ought to part with all his interest, and reserve no partial benefit to himself.

And no interest in it reserved to himself.

If, then, he by deed make an absolute disposition of his personal property, with a reservation to himself of the interest for life, this will be a fraud upon his covenant, an attempt to elude it without inconvenience to himself, by an act in effect testamentary (*b*).

[Thus in *Fortescue* v. *Hennah* (*c*), a father on the marriage of his daughter, covenanted that she, her husband and children, should on his death have a moiety

(*a*) *Supra*, p. 15, *et seq.* (*b*) See Jones v. Martin, 3 Anst. 882. Bro. Parl. Cas. ed. Toml. vol. 6, p. 437, vol. 8, p. 242. 5 Ves. 266 note. (*c*) 19 Ves. 67.

of all the real and personal estate which he should then be seised or possessed of. He afterwards transferred several sums in trust for himself for life, with remainder over: it was held that these sums were subject to the covenant. In *Bradish* v. *Bradish* (*a*), an husband on his first marriage covenanted, that a moiety of whatsoever substance he should be seised or possessed of at his death should go to the children of the marriage. By a deed executed after a second marriage, he assigned part of his property in trust for himself for life, with remainder to his second wife and her children. This was held void as against the children of the first marriage claiming under the covenant.

In *Hankes* v. *Jones* (*b*), a man on his marriage covenanted to give to the children of the marriage a third part of all his chattels, real and personal money, plate, jewels, or any other goods of what nature soever, which at the death of his wife he should be possessed of. Being possessed of a lease for years, he surrendered it, retaking a lease for lives renewable for ever: this was held to be within the covenant.

In a late case (*c*), a question arose on the construction of a similar covenant. The husband previous to marriage settled part of his real estates, and covenanted that he would by will or otherwise, give, devise, and bequeath, all other his real estates, and also all his personal estate and effects whatsoever and wheresoever to his children. It was decided that this applied only to such real and personal property as he should be possessed of at his death; and that he might, therefore, without a breach of the covenant, sell an estate which he was seised of at the marriage, but which was not included in the settlement (*d*).]

(*a*) 2 Ball. and B. 479. (*b*) 5 Bro. P. C. ed. Toml. p. 136. (*c*) Kirkham v. Needham, 3 Barn. and Ald. 531. (*d*) See also on the effect of covenants of this description, Cusack v. Cusack, 5 Bro. P. C. ed. Toml. 116. Prebble v. Boghurst, 1 Swan, 309. 7 Taunt. 538. Willis v. Black, 1 Sim. and Stu. 525.

Performance of covenant to leave a sum to widow.

III. The subject which next succeeds for consideration is, what will be a *performance* of the husband's covenant or agreement to settle, or to leave, or that his executors shall pay to his widow a portion of his personal estate.

This subject, so far as relates to the husband's covenant to settle lands in jointure upon his wife, has been before considered (*a*). The distinction also between the different rules applicable to performance and satisfaction has also been attempted to be explained. What now remains to be inquired into, is the performance of the husband's covenants, mentioned in the title to this section, relating to his personal property, the cases upon which are more numerous than on the former.

It is a general rule, that if the husband covenant to *leave*, or that his executors shall *pay* to his widow a sum of money or part of his personal estate, and die intestate, so that she becomes intitled to a portion of his personal property under the statute of distribution, such distributive share shall be a performance of the covenant; because the law connects the covenant with the distributive share, and performance is an operation of law solely. The principle seems to be this, that the husband, looking forward to the event of his death, when his wife will have an interest in his property by the provision of the law, declines for that reason to give her any interest in it in his lifetime, considering that his covenant will be as effectually performed by what the law provides for her, as if the provision were made by himself (*b*).

The leading case upon this subject, is *Blandy* v. *Widmore* (*c*).

There the husband, by articles before marriage,

(*a*) Vol. 1. chap. x. p. 509, *et seq.* (*b*) Sed. vid. *post*, p. 50, note. (*c*) 1 P. Will. 324. 2 Vern. 709.

agreed, that if his wife survived him he would *leave* her 620*l.*; and he covenanted that his executors should pay that sum within *three* months after his death. He died intestate, and without issue. His widow became intitled to a moiety of his personal estate by the statute of distribution, and which exceeded 620*l.* *Lord Cowper* held that the distributive share was a performance of the covenant.

The next case was, *Lee* v. *D'Aranda* (*a*), from which it appears that the husband covenanted by articles preceding his marriage, to *leave* his wife by deed or will 1000*l.* at his death, if she survived him; or that his executors should pay that sum to her within *six* months afterwards. He died intestate; and the question was, whether his widow was intitled to her distributive share of his personal estate, and also to the 1000*l.* under the covenant? But *Lord Hardwicke*, upon the authority of the last case, decided, that the distributive share was a performance of the covenant.

These two cases have settled the law upon the subject, and although it be observable that the distributive shares were not in strictness payable until the end of a year after the testator's death, and the money under the covenants was to be paid at determinate periods within that time; yet these differences were not permitted to repel the legal presumption of *performance*, as is the case when the question arises upon *satisfaction*, as will afterwards appear when the law upon that subject is considered.

In *Garthshore* v. *Chalie* (*b*), *Lord Eldon* expressed himself in relation to the above two cases to the following effect: "They are distinct authorities, that where a husband covenants to *leave* or to *pay* at his death a sum of money to a person who, independent

(*a*) 1 Ves. sen. 1. 3 Atk. 419, S. C. by the title of Lee v. Cox.
(*b*) 10 Ves. 13.

of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be considered with reference to that; and the Court will not look upon the slight difference between *leaving* and *paying*, nor whether the payment is to be within *three* or *six* months (*a*). In that respect there is always a difference upon what is to be taken in a sense at the end of *twelve* months, but which, I agree, is, in another sense, to be taken from the death of the testator; for the other period is only for convenience, and there is no doubt the property is vested at the death of the party; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months (*b*)."

It must be noticed, that the covenants in the above two cases of *Blandy* v. *Widmore*, and *Lee* v. *D'Aranda*, could not, from their construction, be broken during the husband's life. There was, therefore, no obligation upon him to make any appropriation or settlement at any period before his death. The money to be received under the covenants, and the wife's distributive share, were duties which became payable after the husband's decease; so that the law presumed the latter to be left by the husband to arise out of his estate after his decease, in performance of his covenant, which was to be discharged out of the *same* estate. But if either of the covenants had been so framed as to have required the money to be settled at a period during the husband's life, and there had been a breach of it before his death, then he would have incurred a *debt* to the widow, which would have converted the question from one of

(*a*) Which occurred in the two stated cases of Blandy v. Widmore, and Lee v. D'Aranda. (*b*) See Lord Eldon's observations upon the two cases referred to in the last note, in the case of Twisden v. Twisden, 9 Ves. 426.

performance into that of *satisfaction*, and in such case, according to the rule applicable to that doctrine (as it will afterwards appear), the debt could only be satisfied by something equally certain and beneficial. According to this distinction between performance and satisfaction, *Sir Joseph Jekyll* determined the case of *Oliver* v. *Brigland* alias *Brighouse* (*a*), in which the husband covenanted to *pay* for the benefit of his wife a sum of money *within two years* after the marriage, and that if he died his executors should pay it. He after surviving those years died intestate, and his widow's distributive share of his personal estate was larger than the sum covenanted to be settled upon her; yet since such share was of uncertain amount, and might or might not have equalled in value the debt under the covenant, his Honour decreed that it should not be taken in satisfaction of such debt, but that the widow should have both of them.

It is necessary to remark that the case of *Kirkman* v. *Kirkman* (*b*), determined by *Lord Thurlow*, does not impugn the authorities of *Blandy* v. *Widmore* and *Lee* v. *D'Aranda*, although his Lordship does not appear to be thoroughly reconciled to them. That case was decided upon the proviso in the settlement, from which it was inferred that the legal presumption of performance was negatived, since the husband expressly stipulated that nothing therein-before contained, nor any provision thereby made or intended for the wife should, or should be construed to deprive her of any legal or customary rights to which she was or might become intitled; nor deprive her from taking any provision which he might give, bequeath, or *leave*, her in any manner. It was therefore clear, that her interest in his personal estate, arising from his intestacy,

(*a*) Cited 3 Atk. 420, and 1 Ves. sen. 1. (*b*) 1 Bro. C. C. 96.

could not be, nor be considered, a performance of his covenant in the settlement to *leave* her at his death, or that his executors should pay to or for her use, either of the sums mentioned in it.

In *Garthshore* v. *Chalie* (*a*), *Lord Eldon* acted upon the two cases of *Blandy* v. *Widmore* and *Lee* v. *D'Aranda*. There *A*, the husband, before his marriage with *B*, covenanted that, if he died before her without leaving a child then living, or in *ventre sa mere*, his heirs, &c. should within *six* months after his death pay, assign, &c. to or for the benefit of *B* five eighth parts of such real and personal estates as he should be seised of or intitled to at his decease, or if *B* survived him, and there should be a child of the marriage living at his death, or born alive afterwards, then that his or her heirs, &c. should pay, assign, &c. to and for the benefit of *B* one half part of such real and personal estates as before mentioned. There were issue of the marriage living at *A*'s death, and *A* died intestate in the lifetime of *B*. The question was, whether *B*'s distributive share under the statute of distribution, was to be considered a performance of *A*'s covenant, i. e. whether *B* was intitled first to a moiety of his personal estate under the covenant, and also to one-third of the remainder under the statute? And *Lord Eldon* determined that *B* could only claim one-half of her husband's personal estate which he was possessed of at his decease; and consequently that what she took by operation of law in consequence of her husband's intestacy, was to be considered in performance of his covenant, and that she could not claim both.

It will not have escaped the reader's observation, that the last case differed from the preceding authorities in the circumstance that the property did not merely consist of personalty, but of real and personal estates;

(*a*) 10 Ves. 1.

and that the widow was not the only person in contemplation at the time when the covenant was entered into, but also the children of the marriage, although no express provision was made for them. These differences were not overlooked in the judgment, but they were considered to be insufficient to take the case out of the principle upon which the before-mentioned cases were decided.

A decision that what a widow is intitled to by husband's *equitable* intestacy will be a performance of his covenant.

Sir Thomas Plumer, M. R., proceeded still farther in the case of *Goldsmid* v. *Goldsmid* (*a*), in which he decided, that if the widow take a distributive share of her husband's personal estate, not under an *actual* but a *quasi* intestacy, such share will be a performance of his covenant, that his executors should pay to her a sum of money at his death if he survived her.

In that case the husband, by articles before his marriage, covenanted, that if he died before his wife his executors, &c. should, within three calendar months next after his decease, pay to her 3000*l*. He then made a *will*, and after directing his debts to be paid, appointed four persons his executors, to whom he *gave* all his personal estate. He next directed that so much of his capital in business as should not be necessary to pay his debts, funeral expenses, charitable gifts, and for the support of his *wife* and family, should continue in it for *three* years, and then upon trust to divide the whole of his personal property in such ways and proportions as they thought right. He declared that if any of his family disputed the distribution, and proceeded to implead his executors, in respect of it, such persons should be excluded from every benefit under his will. Two of the executors died before him, a third renounced the probate of the will, and the fourth executor *proved* it, but never undertook the discretionary trusts, which under the circumstances could not be performed; so that the testator's residuary personal

(*a*) 1 Swanst. 211.

estate was necessarily to be distributed amongst his next of kin in the proportions directed by the statute of distribution. His Honor determined that the distributive share was a performance by the husband of his covenant. The foundation of the decree was that the widow having taken after her husband's death, in the events which happened, precisely the same share of his personal property as she would have done had he died actually intestate, the case was to be classed in principle with the preceding authorities.

Upon the perusal of the last case the following observations occur. It appears from the cases and the doctrine to be collected from them, that this species of performance is a presumption of law arising upon the permission of the party in leaving that to be done by the law in the distribution of his property which he would otherwise have done himself, and is founded upon the single circumstance that the party has abstained from doing any act whatsoever in regard to his estate. In such a case the law raises a presumption that the share which it provides for the widow was intended by her husband in performance of his covenant. It further appears that the presumption may be repelled by *parol* evidence (*a*). These things being so, the principle of performance does not seem to apply to the last case, because the covenantor was not merely passive but active, since he disposed of all his personal estate by will, and did not permit its distribution by dying legally and actually intestate. On the contrary he *meant* to dispose of the whole of his estate, which disposition was alone prevented by accidents occurring after his death; hence there is stronger evidence than that by parol to repel the legal presumption of intended performance (*b*). And with respect to the

(*a*) 10 Ves. 10.

(*b*) But it may be doubted whether this reasoning can correctly be applied to cases relating to the performance of the husband's

testator dying equitably intestate, it appears from the judgment of *Lord Bathurst* and the opinion of *Sir William Grant* (the late Master of the Rolls), that equitable intestacy is not the same in every respect as legal intestacy, and upon the principle, that when a complete will is made, but there is not an effectual disposition of the residue, the next of kin, although they take their shares *ex necessitate* in the proportions mentioned in the statute of distribution, yet do not so take those proportions under it, but *eodem modo* as if named in the will (*a*). It, therefore, seems that the case, upon which the present remarks are made, does not fall within the principle of performance, and consequently it might have been expected that the widow would have taken her share of the undisposed residue, as also her debt under her husband's covenant.

If the husband's covenant be *entire*, and the provision therein expressed to be secured to the wife is such as the covenant in *part* might be held to be performed by the widow's distributive share under her

Exception out of the doctrine of performance when covenant is *entire*, and part of it only can be performed by widow's distributive share under her husband's intestacy.

covenant by a distributive share of his property devolving on his wife. These cases do not seem to depend on any presumption of the husband's having purposely died intestate. They turn upon the question, whether the share which the wife receives is a substantial compliance with the intention of the covenant: the Court for this purpose putting on the covenant an enlarged construction, with reference to the relation between the parties, and considering the intention to be that she shall receive the sum contracted for "without regarding the manner how" (1 Ves. Sen. 1); the question depends, therefore, merely upon the intention of the covenant, a point upon which it would be difficult to contend for the admissibility of extrinsic evidence. The passage in 10 Ves. 10, (referred to in the text), where the Lord Chancellor speaks of receiving parol evidence, alludes to cases on the performance of covenants to purchase and settle estates,—a class of cases essentially distinct, depending on the presumed or actual intention with which the purchase is made. Vid. *ante*, vol. 1, p. 510, *et seq.*

(*a*) *Supra*, pp. 6, 7.

husband's intestacy, according to the preceding cases, and the remaining part could not be so considered; then since the covenant is entire, the Court will not split it, and hold a performance and a non-performance at the same time. In order to illustrate this:—

Suppose the husband to covenant with trustees that his heirs, &c. should pay to them 6000*l.* within a certain period after his death; upon trust as to 1500*l.* part of the sum for his widow *absolutely* if she survived him; and as to the remaining sum of 4500*l.*, to pay the interest of it to her during her *life* or widowhood. Since the last sum, not given absolutely to the widow, could not be considered satisfied by her distributive share; neither could the 1500*l.* be so considered, although she took an absolute interest in it. This was the ground of the decree in *Couch* v. *Stratton* (*a*), and which, by such a resort for the decision, impliedly admits the authority of the former cases upon this subject.

But it will be no objection to the application of the doctrine of performance, that the widow's distributive share is *less* than the amount of her provision under her husband's covenant, as it is in the instances of *satisfaction* after mentioned; because the intention of the husband to perform his covenant by permitting a portion of his property to devolve upon his widow, being an inference of law upon that permission when the two interests are of equal value or the latter more; the inference is continued when the share is inferior in amount to the sum provided by the covenant; so that if the money covenanted to be paid by the husband's executors, &c. be 1000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part-performance of the covenant, viz. to the extent of 500*l.*

Part-performance.

(*a*) 4 Ves. 391.

The reasonableness of this presumption appears from a supposed case put by *Lord Eldon* in the case of *Gartshore* v. *Chalie* (*a*). His Lordship said that "the Court adverting to the circumstance that the widow will take part of her husband's property at his death, it is difficult to say that if she receive 1000*l.* in discharge of 1000*l.*, her residuary share, she takes it in satisfaction of 1000*l.* covenanted to be paid to her, as it is the full amount; but that if such share amount only to 999*l.*, she shall not merely have the additional pound, but the sum of 1999*l.*, for that must be the consequence, where the residue may be only 2000*l.*, and she may be contending with others than her children. That is not the natural or legal meaning of such a covenant."

What now remains to be considered is—

IV. The *satisfaction* of covenants as distinguished from the performance of them.

Satisfaction of husband's covenant as distinguished from performance.

In what that difference consists the reader is referred for information to a preceding chapter, in which are considered the performance and satisfaction of the husband's covenants to settle lands in jointure upon his wife (*b*). It is sufficient to remark in this place, that performance is an inference of the covenantor's intention to do so implied by law, and that satisfaction is an inference of his intention arising from his own act and disposition, as by will (*c*). Where the provision was actually settled upon the wife, and to commence in the husband's lifetime, and not resting in covenant, and to begin after his decease, the rules of satisfaction in regard to arrears accrued during his life by his testamentary disposition, are treated of in the "Law of

(*a*) 10 Ves. 16. (*b*) Vol. 1, chap. 10, p. 510, *et seq.*

(*c*) "Satisfaction supposes intention. It is something different from the subject of the contract, and substituted for it; and the question always arises, was the thing done intended as a substitute for the thing covenanted? a question entirely of intent." 1 Swan. 219.

Legacies" (*a*). The subjects for consideration in this section are what will be a satisfaction of the husband's covenants or engagements to leave or settle upon his widow a portion of his personal estate. The general rule is, as it has been before stated (*b*), that the thing presumed to be given in satisfaction of that agreed to be done must be exactly of the same nature, and equally certain and beneficial to the widow as the performance of the covenant or obligation. The rule will be exemplified by considering the instances in which testamentary dispositions have been adjudged not to be a satisfaction of the husband's covenant or obligation.

No satisfaction if the bequest be less in amount than the covenant.

1. If the testamentary disposition to, or in favour of the wife, be *inferior* in value to the husband's covenant or obligation, the former will not be presumed or considered to have been given in satisfaction or in *part* satisfaction of the latter; but the benefit which she takes under her husband's testament will be inferred to have been bequeathed to her as a bounty, and accumulative (*c*).

Nor if the legacy be given upon a contingency, or be payable at a later period.

2. If the testamentary disposition be not so beneficial to the wife as her interest under the covenant or obligation of her husband, as when the legacy given to her depends upon a *contingency* (*d*); or where such legacy and the provision by covenant or agreement are payable at *different* times, and the latter is due at an earlier period than the former; these variations between the two provisions will repel the inference of satisfaction.

An instance of the latter kind occurred in the case of *Haynes* v. *Mico* (*e*): the husband, upon his marriage, entered into a bond to trustees to leave his intended wife 300*l.*, *payable in a month after his death*, if she

(*a*) 2 Vol. p. 1, &c.
(*b*) Vol. 1, chap. 10, p. 510.
(*c*) 1 Ves. sen. 263.
(*d*) 2 P. Will. 553. 2 Atk. 426.
(*e*) 1 Bro. C. C. 129.

survived him. He, by will, gave to her 500*l.*, *payable within six months* after his decease. The question was, whether the legacy was to be taken in satisfaction of the 300*l.* secured by the bond? And *Lord Thurlow* decided in the negative; his Lordship observing, that in *Clark* v. *Sewell* (*a*), *Lord Hardwicke* laid down the rule, that where there was a difference in *any* circumstance, between a legacy and the debt or obligation, the former should not be deemed a satisfaction; therefore, in that case the debt being payable in *one* month, and the legacy in *six* months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt (*b*).

[But if the legacy be payable at an earlier period than the sum covenanted to be paid, and be of equal amount, it will be a satisfaction, and the presumption

(*a*) 3 Atk. 96.

(*b*) It will be observed that in this case the legacy differed from a literal compliance with the covenant, only in the time at which it was made payable, and on account of that difference it was held not to be a performance. This appears at first sight inconsistent with the cases relative to the performance of covenants by the devolution of a distributive share, on the covenantor's intestacy, in which, as it has been seen, such slight circumstances of difference have not been regarded, *Ante*, p. 46. And the case of Haynes v. Mico, has, therefore, been sometimes questioned. See 4 Madd. 331. There is, however, this distinction between the performance of a covenant by a legacy, and by a distributive share: that the legacy "*primâ facie* imports a bounty and intention of kindness, absent in the case of intestacy," 10 Ves. 17: it must be considered as a voluntary gift, unless there be "strong circumstances of a contrary intention," 2 Bro. C. C. 395. Hence, although the legacy be given so, that it may be regarded as in substance a performance of the intention of the covenant, it is taken to be an additional bounty, unless the will raises the presumption that the testator gave it for the purpose of satisfying his obligation,—a presumption which is in general repelled by small variations between the bequest and the obligation. On the other hand, in cases of intestacy, there can be no intention of bounty; and, therefore, the only question is, whether the meaning of the covenant is in substance complied with.

that it was so intended will not be repelled by a direction in the will, that all the testator's debts shall be paid (*a*).]

Nor when the two provisions are of different natures.

3. If the property bequeathed to the widow, and the interest that she is intitled to under the covenant or obligation of her husband, be of *different natures*, or for *different interests*, as if the provision by covenant or agreement be *money*, and that by will be of *lands*, or the wife's estate under the former be *absolute*, and her interest under the latter be for *life* only; these circumstances will also be sufficient to repel the inference of satisfaction (*b*).

Thus in *Forsight* v. *Grant* (*c*), the husband entered into a bond to pay 2000*l.* within three months after his death, to his intended wife for life, then for their children; but if none, then for his wife *absolutely*. After this, he by will gave all his real and personal estates to trustees, upon trust to pay the rents and interest to his wife for *life*, and after that event to divide both real and personal estates among his children, &c. There were no children of the marriage. The question was, whether the widow was intitled to the benefit of the bond, and also to the provision in the will? And it was so decreed; it having been admitted by her opponents, that unless she could be put to an election from some expression in the will, the bequest could not be considered a *satisfaction*, because under the bond she was intitled to a *principal* sum within three months after her husband's death, but that under his will she was only intitled to the *rents* and *interest* during her *life*, which were provisions of a *different nature*. Again,—

In *Richardson* v. *Elphinstone* (*d*), the husband covenanted in marriage articles to pay to his wife, if she

(*a*) Wathen v. Smith, 4 Madd. 325. (*b*) 2 P. Will. 614.
(*c*) 1 Ves. jun. 298. (*d*) 2 Ves. jun. 463.

survived him, 200*l.* free from all deductions, in the name of a jointure, and 50*l.* to provide herself with a house, yearly during life, to commence at *Whitsunday* or *Martlemas* which should first happen after his death. He by will directed his debts to be paid, and devised to his wife for life a house with the goods, plate, &c. in it; and he bequeathed his residuary personal estate to trustees, in trust to invest it in stock, and to permit his wife to receive half-yearly 100*l.* annually during her life. Whether these bequests were a satisfaction of the covenant, was the question. And *Lord Alvanley*, M. R., determined in the negative, and referred to three cases, *Eastwood* v. *Vinke* (*a*), *Broughton* v. *Errington* (*b*), and *Haynes* v. *Mico* (*c*). His Honor's observations are so consistent with what ought to be the rules of property in a *free* state, where the *certainty* of the rule is even more desirable than the principle upon which it is founded, that I shall not consider it an intrusion upon the time of the reader to transcribe his Honor's words, as reported: "After these cases (the three to which he referred), it would be *presumption* for any one sitting where I do to hold this a satisfaction; and when it is considered how much more material it is that *certainty* should be pursued, than that *conjectures* should be formed of the intention, and how easy it would be to say it should be in satisfaction if the testator intended it; even were it *res integra*, I should hold that where a man is under an obligation to do an act, and does it not, but performs something else that may by *ingenuity* be construed a satisfaction, it is *safer* to say, that it is not a satisfaction. The above three cases are nearly upon the same footing as the case of a bond debt due to a stranger. Here if the

(*a*) 2 P. Will. 614, stated vol. i. p. 516.

(*b*) 7 Bro. Parl. Ca. 461, 8vo. ed. and stated vol. i. p. 514.

(*c*) 1 Bro. C. C. 129, stated *supra*, pp. 54, 55.

testator had the articles in contemplation, it is absurd to suppose he should give a real estate in satisfaction for *half*, and an annuity payable and commencing at different times for the other half (provisions so extremely *different*), without expressing it to be a satisfaction. This, therefore, is no satisfaction of the covenant (*a*)."

Nor when the bequest is expressed to be made from a particular motive.

4. Suppose the two provisions to be *ejusdem generis*, and commensurate in interest, yet if the provision by will be expressed to be given for a particular purpose, or from a particular motive, such purpose or motive will prevent the testamentary gift from being a satisfaction of the covenant or agreement (*b*), because the former was given *diverso intuitu*, which repels the presumption of an intended satisfaction of the latter. Again,

Whether the bequest of a residue or a share of it is a satisfaction.

5. If the benefit given to the widow by will consist of the whole or part of the husband's *residuary* personal estate, it has been decided that such bequest, although it may be eventually of as large or larger amount than the money covenanted or agreed to be paid to or for her by him, or his executors, shall not be a satisfaction of such covenant or agreement; for *non constat* at the date of the will, whether at the testator's death, after all claims upon his property are satisfied, his estate, which is in continual fluctuation till that event happens, will be equally beneficial to the widow as the sum secured to her by the covenant or agreement. It is, therefore, inferred from the nature of a residue, and the uncertainty of its amount, that the husband did not intend by such an indefinite bequest that it should operate as a satisfaction of a certain and definite duty (*c*). This is the principle upon

(*a*) See also Alleyn v. Alleyn, 2 Ves. sen. 37. Matthews v. Matthews, 2 Ves. sen. 635; and Grave v. Lord Salisbury, 1 Bro. C. C. 425. (*b*) See the cases last referred to. (*c*) 1 Ves. sen. 520.

which *Lord Kenyon* professed to decide the case of *Devese* v. *Pontet*, as reported by *Mr. Cox* and *Mr. Finch* (*a*).

In that case the husband covenanted in marriage articles that if his intended wife were the survivor, and there should be no issue, his heirs, &c. should within nine months after his death pay to her 800*l.* for her own use; but if there were any child or children of the marriage, then that the interest should be paid to her for life, and the principal after her death to or among such child or children, &c. Subsequently to this, the husband by will, after bequeathing several specific articles to his wife, directed that all the debts owing to the business which he then carried on, should be collected with all possible dispatch; that the household goods and stock in trade should be valued, and the money which should be in the public funds, and the produce of all being collected, the whole should be divided into two equal shares; the one to be the property of his wife, the other of his brother. One question was, whether the bequests to the widow were a satisfaction of the testator's covenant? And his Honor decided in the negative, concluding his judgment upon that part of the case thus: "Upon the principle, therefore, of *Lords Somers* and *Hardwicke*, that the residue shall not be taken in satisfaction, I am of opinion that the covenant in the marriage articles is not satisfied by the provision of the will."

The reader must be apprised that *Lord Eldon* ascribes the decision in the last case to the covenant being *entire*, so that as the bequest of the residue could not be a satisfaction of the whole covenant, it should not be so of a *part* of it (*b*); yet it cannot avoid observa-

(*a*) 1 Cox's Cases, 188, and Pre. Ch. 240, in a note; *et vide* 2 Ves. sen. 37, and 15 Ves. 513. (*b*) See Garthshore v. Chalie, 10 Ves. 15.

tion, that *Lord Kenyon* expressed the foundation of his decree to be, that a residuary bequest was not to be considered a satisfaction of the husband's covenant to pay to the legatee an ascertained sum; and upon the principle before stated.

In a subsequent case of *Bengough* v. *Walker* (*a*), *Sir William Grant* appears to have distinguished between a *debt* and a *portion*, and he intimated that a residuary bequest might probably be considered a satisfaction of the latter, if of larger or equal amount; and he alluded to the decision of *Lord Thurlow*, in *Rickman* v. *Morgan* (*b*); yet that case was not decided upon any general rule applying to the doctrine of satisfaction, but upon the proviso in the settlement, "that all subsequent advancements by the father should be deducted out of the portions, *unless otherwise declared* by him in *writing*." The father afterwards bequeathed 4000*l.* to his wife for life, and after her death to *B*, his third son; and he gave to *B* (who was intitled to 8000*l.* the provision in the settlement), the *residue* of his personal estate, which amounted to more than the portion of 8000*l.* The determination was, that the bequest should go in satisfaction of *B*'s portion under the settlement. The observations, however, which naturally arise upon the consideration of that case are, that the father had restrained himself to certain terms in regard to the disposition of his property amongst his children

(*a*) 15 Ves. 513. (*b*) 1 Bro. C. C. 63, continued 2 Bro. C. C. 394. In this case Lord Thurlow expressed a strong opinion of the absurdity of holding that a gift of the whole residue should not be a satisfaction, when the gift of a legacy of smaller amount would be. But where as in Devese v. Pontet, and Barret v. Beckford, 1 Ves. sen. 519, a residue is given between two persons equally, different considerations may be applied: there appears to be an intention of equal bounty towards each: but if the share of one be taken in satisfaction of a prior debt, he derives less benefit from the bequest.

subsequently to the date of his marriage settlement, viz. that all future provisions which he should make for any of them should be deducted out of their portions provided by the settlement, without a *written declaration* by him to the *contrary*. The father, therefore, having bequeathed to his son the residue of his personal estate, without making any declaration in writing that it should go in satisfaction of his portion, the Court, upon the face of the settlement, could not avoid decreeing that such residuary bequest should go in satisfaction of the son's portion under that instrument; and in doing so, *Lord Thurlow* did not, nor did he intend to infringe, upon any rule established upon the subject in prior cases.

Upon the whole, it is presumed from the intention inferred, as before stated, from the uncertainty in amount of a residue, that a bequest of the whole or of part of it to the widow will not be considered a satisfaction of her husband's covenant or obligation to pay or to leave to her a certain portion of his personal estate.

When part of the residue is so bequeathed as not to be uncertain in amount, it will be a satisfaction of the covenant.

This principle, however, does not apply when part of the residue is bequeathed in such a form as to afford no uncertainty in regard to the amount of the proportion of it intended to be given. Suppose, then, the husband's covenant be to leave, or that his executors shall pay to his widow 2000*l.* and he devise to her *so much* of his *residuary* personal estate as shall be of the value of 2000*l.* Since the amount of the legacy is equally certain as the sum secured by the covenant, it would seem that the bequest of the 2000*l.* would be a satisfaction of the covenant, to pay to the legatee the sum of 2000*l.* (*a*) And probably it would make no difference if the value of the bequest appeared to

(*a*) See 15 Ves. 514.

exceed the sum stipulated to be left or paid, although it were made subject to a charge, for if the Court were able to perceive that after allowing for such charge there remained a surplus of the sum bequeathed, greater than or equal to the husband's obligation or covenant, why in that case the bequest should not be considered a satisfaction of the covenant no solid reason appears. "If," said the Master of the Rolls, in *Bengough* v. *Walker* (*a*), "I see that the bequest is so large, so far exceeding the portion, that the diminution of the burthen imposed upon it cannot affect the relative proportion, it would be against common sense to say, that if a bequest of ten times the amount of the portion is burthened with a charge not to the extent of a tenth part, the remainder, though greatly exceeding the portion, shall not be a satisfaction."

Parol evidence.

The presumption once raised upon the husband's will, that a devise was intended by him in satisfaction of his covenant, may, like other presumptions, be repelled by *parol* evidence (*b*); but it is conceived that such testimony is inadmissible to *raise* the presumption, by showing that he *meant* to satisfy his covenant, when no such intention appears or can be legally inferred from his will (*c*).

V. With respect to the title of the wife, surviving her husband, to a share of such part of his personal estate as was limited "to his next of kin," or "to his next of kin or personal representatives," or "to his relations," what has been detailed in a prior chapter (*d*) whilst treating upon the husband's right as his wife's next of kin, applies to the case now under consideration.

(*a*) 15 Ves. 515. (*b*) See Jeacock v. Falkener, 1 Bro. C. C. 295. Pole v. Lord Somers, 6 Ves. 319. Druce v. Denison, ibid. 385, 397. 10 Ves. 10. (*c*) Sowden v. Sowden, 1 Bro. C. C. 583. Also see vol. i. p. 471. (*d*) Chap. viii. vol. i. p. 327.

The rule may be considered settled, that if the ultimate limitation of personal property in a settlement or will be made to the husband's "next of kin," or "to his next of kin or personal representatives," or "to his relations," or if he by will bequeath his personal estate as above, his widow will be *primâ facie* excluded; because the statute of distribution, according to which the property is to be divided, includes under the term "kin," or kindred," such persons only as are related to the husband by *blood;* a description not answered by the widow.

Limitations to husband's next of kin.

Thus in *Nichols* v. *Savage* (*a*), the testator bequeathed his residuary personal estate in this manner; "to all and every my next of kin that would have been intitled to my personal estate under the statute made for distribution of intestates' estates, in case I had died intestate:" the Court decided that the widow was not intitled to a share with the testator's next of kin. Again,

In *Garrick* v. *Lord Camden* (*b*), the widow's claim depended upon the construction to be put on the following clause in her husband's will; "and in case after the payment of all the said legacies, bequests, and expenses, there shall remain any surplus money or personal estate, I direct the same to be divided amongst my next of kin, as if I had died intestate." It was contended for the widow, that the Court ought to construe the words, "amongst my next of kin, as if I had died intestate," as if the clause had stood thus: "to be divided as if I had died intestate," omitting the words "amongst my next of kin (*c*);" but *Lord Eldon* observed, that the whole course of modern authority was against taking that as the *first* construction of the

(*a*) Cited 18 Ves. 53. (*b*) 14 Ves. 376, 381, 386. (*c*) For the effect of such a clause, see vol. i. p. 330.

words; and that whatever might have fallen from judges, describing the husband as next of kin to his wife, the tenor and bent of modern decisions went to this extent,—that if a husband bequeathed to his next of kin, that bequest did not *primâ facie* include his wife; and that it was quite clear that if a married woman, under a power by settlement, bequeathed to her next of kin, it would be impossible to hold, that under the construction of such a will, *without more*, the husband would take as sole next of kin. The opinion of his Lordship in the present case, was thus expressed; "Upon the whole, I think the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words."

To his relations.

So also in *Davies* v. *Baily* (*a*), the husband bequeathed to trustees his residuary estate, to pay the interest of it to his wife for life (which raised a strong inference of his intention that his widow was to take no other interest in that fund); and after her death he gave the capital "to such of his *relations* as would be intitled thereto by the laws in force, of distribution, to be divided as the said laws direct." *Lord Hardwicke*, after commenting upon the relation between husband and wife to the effect before stated, decreed, under all the circumstances of the case, that the widow was not intitled to any part of the principal of the residuary estate.

The last case was followed by that of *Worseley* v. *Johnson* (*b*), in which the husband, after devising his lands to his wife for life, remainder to *A* in tail, directed that in default or failure of issue of *A*, the lands should be sold, and the money divided "amongst his *relations*, according to the statute for distribution of

(*a*) 1 Ves. sen. 84. (*b*) 3 Atk. 758; see also Maitland v. Adair, 3 Ves. 231.

intestates' estates where no will is made;" and he then gave certain houses in *F* to his wife in fee. After the death of the wife, and the death and failure of issue of *A*, the wife's executor filed a bill for the sale of the lands, claiming a moiety of the proceeds under the statute of distribution; but *Lord Hardwicke*, upon the same principles which governed his decision in *Davies* v. *Baily*, dismissed the bill.

From the last two cases, and from what fell from *Lord Eldon* in the case of *Garrick* v. *Camden*, there can be no doubt that limitations to the husband's next of kin, &c., may be attended with such circumstances as to intitle his widow to participate in the property so limited, but such a case does not appear to have yet happened.

To his personal representatives.

With respect to the widow's title, under limitations of personal estate, "to the legal personal representatives of the husband," there appears *primâ facie* no objection to her taking under that description; for the legal personal representative of the husband is his executor or administrator; and if his widow be clothed with either character (an event which may happen), she then answers the description in the instrument, and for that reason can show a good *primâ facie* title (*a*). But as the widow may take a share, under a limitation, to her husband's next of kin (as we have seen), under the particular circumstances which might attend such limitation, so also she may be excluded from taking any beneficial interest in the character of her husband's legal personal representative, when such an intention can be collected from the instrument in which the limitation is contained. When, therefore, the limitation occurs in the husband's marriage settlement, *Sir William Grant*'s observations in *Bailey* v. *Wright* (*b*), for the

(*a*) 1 Anstr. 328.

(*b*) See vol. I. p. 328.

widow's exclusion, apply; and in what other instances this legal title may and may not be defeated under particular circumstances, the cases referred to in the note (*a*), will assist the reader.

(*a*) Evans v. Charles, 1 Anstr. 128. Bridge v. Abbot, 3 Bro. C. C. 224. Jennings v. Gallimore, 3 Ves. 146. Long v. Blackall, 3 Ves. 486.

CHAPTER XV.

THE EFFECTS OF MARRIAGE UPON THE ACTS AND AGREEMENTS OF HUSBAND AND WIFE PRIOR TO MARRIAGE; AND THE HUSBAND'S LIABILITY IN RESPECT OF THOSE ACTS AND AGREEMENTS.

It is proposed to consider the subjects falling within the above division of this treatise under the two following *heads* or sections:—

I. *The effects of marriage upon the wife's acts and agreements while single, and the liability of the husband in respect thereof.* And,

II. *The effects of marriage upon the prior acts and agreements of the husband, with or in relation to the wife, and his liability to perform the same.*

I. The effects of marriage upon the wife's acts and agreements whilst single, and the husband's liability in respect of them.

1. The unity of persons which the law in policy creates in husband and wife, operates to extinguish or revoke several acts of the wife, prior to marriage, that might prove injurious to her husband, and to which he was neither privy nor consenting.

In what instances the disposal by the wife of her property, before and in contemplation of marriage, will be fraudulent and void against her husband, has been before considered (*a*). She is not allowed to make or appoint an attorney without her husband's concurrence,

(*a*) Vol. I. p. 163.

for that would enable her to charge him without his consent; and this is one of the reasons why he is a necessary party in all actions brought by her, as is afterwards noticed. Upon the same principle, if the wife *dum sola execute* a warrant of attorney, it will be revoked by her subsequent marriage (*a*). But the reason does not apply to the instance of her *acceptance* of such a warrant to confess a judgment; so that if a warrant of attorney be given to her, whilst single, to confess a judgment, and she afterwards marry, it will not be revoked by her subsequent marriage, and the Court will give leave to enter up judgment upon it (*b*). Again,

Marriage a revocation of wife's warrant of attorney, not of her acceptance of such a warrant.

In *Blunden* v. *Baugh* (*c*), *Jones*, *Berkley*, and *Croke*, Js., said, that where a woman, lessee at *will*, marries, or where a single woman grants a lease at *will*, and then takes a husband, although she has placed her will in his hands, yet the marriage shall not be considered a determination of it without the *election* of the lessor or husband to the contrary.

Woman lessee at will marries, marriage not a revocation.

2. If a woman make a will and afterwards marry, the marriage will be a revocation of the will; first, because it was her own act in taking a husband subsequently to its date; and, secondly, because the construction that marriage is only a revocation, in case the wife show her intention that it should be so, might be disadvantageous to her, since the husband, by the exercise of undue influence, might oblige her to revoke or to continue the will as best suited his interest (*d*).

But marriage is a revocation of a woman's will and testament.

But it has been said (*e*), that if the wife survive her husband, the revocation or countermand of the will by marriage is done away, upon the principle that the disability of marriage being removed, there is nothing to

(*a*) Anon. Salk. 117. 399. *Contra.* Anon. 1 Show. 89. Anon. Loft. 329. (*b*) Marder v. Lee, 3 Burr. 1469. See 7 Mod. 53. 12 Mod. 383. (*c*) Cro. Car. 304. Henstead's case, 5 Rep. 10. S. P. (*d*) Forse v. Hembling. 4 Rep. 61. 2 P. Will. 624. (*e*) Plow. Com. 343, *a*.

prevent the will made prior to the coverture from taking effect at her death. But this doctrine is not altogether free from objection; for it is essential to the nature of a will that it should be ambulatory and liable to be altered or revoked at any period during the life of the testator. This being so, the woman, by marrying, disables herself from making any other will, or altering or revoking the old one, so that the instrument upon the marriage ceases to fall under the essential description of a will; and, as it is conceived, must be void, whether the woman survive her husband or not (*a*). And mark the distinction when the disability is to be imputed to the party, and when to the visitation of God; for if a person, after making his will, become *non sanæ memoriæ*, the disability will not revoke it (*b*).

Notwithstanding the husband's agreement to it before marriage.

Although the husband by articles, or otherwise in writing, consent to a will made by his intended wife *before* marriage, containing dispositions of her real estate, such consent will not prevent the revocation effected by the subsequent marriage, but the wife's heir will at *law* (*c*) be intitled to the estate after her death (*d*).

[If a feme sole surrenders a copyhold estate to the use of her will, a subsequent marriage is a revocation or suspension of the surrender.]

Thus, in *George* v. —— (*e*), *A*, in *August* 1712, *surrendered* her copyhold lands to the uses of her will, and, in *November* 1714, she, upon and prior to her

(*a*) It was so decided in Lewis's Case, 4 Burn. 51. See 2 Bro. C. C. 554. 2 Term Rep. 697. (*b*) 4 Rep. 61, *b*. (*c*) For the equitable doctrine relating to the present subject, see chap. xix. sect. 1.

(*d*) This supposes the husband's consent to her making a will to be expressed by a writing not operating as a conveyance of the estate, and therefore not giving her a power over the use; in which case her will cannot take effect at law as an appointment, and as a will it is revoked by the marriage. See Doe v. Staple, cited *post*.

(*e*) Ambl. 627.

marriage with *B*, entered into articles reciting the surrender, and that *B* agreed that she *should have power* to settle her estate, or to devise it during the marriage without his contradiction. In *June* 1736, she and her husband mortgaged the premises for ninety-nine years, but no fine was levied nor surrender made, and, in *August* 1743, she made a will reciting her power, purporting by it to dispose of the copyhold estate. Upon her death, her heir claimed the premises against her will. And *Willes*, C. J., and *Birch*, J., decided in favour of the claim; the former observing, that the surrender by the wife when *sole* became void, or at least was suspended by the subsequent marriage; that the Lord could never be considered a trustee, as the fee-simple remained in the copyholder; and that since a married woman could not make a will nor declare the uses of a surrender which was void or suspended by the marriage, her heir was intitled (*a*).

The above case supports the opinion of *Ashurst*, J., in *Doe* dem. *Hodsden* v. *Staple*, next stated; and which latter case establishes this doctrine, that if a will be made by a woman before marriage, and her husband before such marriage, but after the date of the instrument, agree "that she may dispose of her real estates by will," the will alluded to is to be considered a *subsequent* will, so that the agreement (supposing it to be effectual as to a subsequent will (*b*)), cannot authorise or protect the will previously made, which must, therefore, be revoked by the marriage, both at law and in equity.

Instance of husband's agreement being construed not to extend to wife's will made before the marriage.

Accordingly, in the case of *Doe* dem. *Hodsden* v. *Staple* (*c*), *A*, in contemplation of a marriage with *B*, signed a paper writing *without seal* or stamp, which,

(*a*) The surrender being suspended, the will was imperative at law, the Court intimating that it might be good in equity. See *post*, chap. xix. sec. 1.

(*b*) See *infra*, chap. xix. sect. 1.

(*c*) 2 Term Rep. 684. See Hodsden v. Lloyd, 2 Bro. C. C. 534.

after reciting the intended marriage with *B* her future husband, and that she was intitled to considerable real and personal property, stated, that it was agreed that her fortune should be settled to their joint use, for her life, or the life of the survivor, and that if she survived, her whole fortune, together with her plate and jewels, should be settled to her own use; but that *if she died first, then, that her fortune should be at her own disposal.* *B* signed a duplicate of the paper. On the *same* day *A* made her will, duly executed to pass freehold property, giving the interest of her fortune to *B*, her intended husband; and after specific devises (but not mentioning the reversion in the premises), she gave her estate and residuary effects to *B*, whom she appointed executor. On the *same* day the marriage was solemnized, and *A* afterwards died before *B* without issue. The question was between *B*, the husband's devisee, and the heir of *A* who claimed the property, under the presumption that the will of *A* was revoked by her marriage; and so the Court determined; for as the will was made before the marriage, it was revoked, and it was not supported by the agreement, which was not a deed for want of a *seal*, so that it could not operate as a covenant by the husband to stand seised to uses; and *Ashurst*, J., observed, that the agreement referred to an *executory* act, and not to a will made prior to the marriage; and he said, that it might have been a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for the purpose; because it would be a stipulation in direct opposition to a positive rule of law (*a*).

(*a*) See 1 Lord Raym. 516. As the agreement, not being under seal, did not give the wife a power over the use, the will was inoperative at law; *ante*, p. 69, note. And as the power was construed to apply only to an appointment made after the marriage, the will could not take effect in equity under the power. But if a settlement

Submission to arbitration revoked by a woman's marriage.

3. A submission to arbitration will be revoked if a party, a single woman, marry before the award; and it will make no difference if the arbitrator afterwards make his award without notice of that event (*a*).

Of release by marriage.

4. In some instances marriage will operate as a release.

Wife's bond.

Thus, if the wife give a bond to her intended husband, in consideration of the expected marriage, binding herself in that event to convey her real estates to him in fee simple, the obligation will be extinguished and released at law by the marriage, for the reason after mentioned; but it will be supported in equity, as it was determined by *Lord Macclesfield*, in *Cannel* v. *Buckle* (*b*), who observed, that the impropriety of the security, as of a bond from a woman to a man whom she intended to marry, or the inaccurate manner of wording it, was not material in equity; for it was there sufficient that the bond was a *written evidence* of the agreement of the parties, that the wife, in contemplation and consideration of marriage, agreed that her intended husband should have the land as her portion; which agreement being upon a valuable consideration, should be executed in equity, for it was unreasonable that the marriage, upon which alone the bond was to

gives to the intended wife a power, in terms applicable to an appointment made before or after the marriage, it seems that a will made between the execution of the settlement and the solemnization of the marriage, might be supported. This was the case in Taylor v. Raines, 7 Mod. 147, where the will was considered to be effectual as an appointment. See Stone v. Forsyth, Dougl. 681. 683. *n.* And this is conformable to principle, for when the wife's testamentary power is not destroyed by the marriage, the reason for which marriage is held to be a revocation does not apply.

(*a*) 1 Bac. Abr. 483. And where the submission was by deed with a covenant to abide the award, it was held that the marriage was a breach of the covenant, as it incapacitated the arbitrator from making an effectual award. Charnley v. Winstanley, 5 East. 266.

(*b*) 2 P. Will. 243.

take effect, should itself be a destruction of such bond; that the foundation of the notion was, that in law, the husband and wife being one person, he could not sue his wife upon the agreement, but that was not so in equity, since they might there implead each other.

Husband's liability for his wife's debts due at time of marriage.

5. With respect to debts which the wife contracted whilst single, and remained due at the time of the marriage, the husband is liable, and it is but reasonable that the law which, by the marriage, gives to the husband all his wife's personal estate in possession, and the power of recovering or disposing of all her personal property in action or in contingency, that by possibility may fall into possession during the coverture, should make the husband liable for his wife's debts, owing at the period of the marriage. This liability, however, as it originates in the marriage, ceases with it; so that if the debts be not recovered during its continuance, the husband will be discharged if he survive his wife (*a*).

His responsibility continues only during the marriage.

His liability in respect of property received with wife,

This discharge of the husband will not be altered, although he may have received a large fortune with his wife, and it seems to be just, because his liability would have been the same if he had received nothing with her. But a distinction prevails upon this subject which is necessary to be attended to, viz. between such part of the wife's estate which the husband receives *qua maritus*, and such portion of it as does not belong to him in that character, but as the *administrator* of his wife: in the first case, his responsibility for his wife's debts due at the period of the marriage determines with her life; in the second, he is liable to answer to the extent of her assets, for since he cannot recover her property outstanding at her death, except as her administrator, it will, as in ordinary instances, be assets to pay her debts.

as her administrator.

(*a*) Roll. Abr. 351. And if the husband die before the debt is recovered, the wife surviving is liable. Woodman v. Chapman, 1 Campb. 189.

Thus in *Heard* v. *Stanford* (*a*), the defendant's wife, before marriage, gave a note for 50*l.* to the plaintiff in consideration of five years' service, and then married the defendant, who received with her a fortune of 700*l.* part of which consisted of *choses in action*, some of which the defendant received as *husband*, and the remainder he took as *administrator* to his wife. The question was, how far in equity the husband was liable to pay this debt of his wife? And *Lord Talbot*, after detailing the law upon the husband's liability, decreed an account of what the husband had received since his wife's death as her administrator, and declared that the husband should be liable for so much only. And as to any further demand, he dismissed the bill. In regard to *Powell* v. *Bell* (*b*), which had been cited, his Lordship observed, that there the wife was administratrix of her first husband; that it did not appear what she had in her own right, and what as administratrix; in the latter of which cases the marriage was no gift in law of the property which she had in *autre droit*; and that upon the last reason only were founded all the cases where a surviving husband had been charged with his wife's debts after her death.

The principle of those cases is, that the wife being executrix or administratrix, the assets which the husband received during the marriage in right of his wife as such executrix or administratrix, and which he had a right to receive, made him after his wife's death an accounting party to the persons intitled to them. This subject has been fully discussed in the first volume of this work (*c*), to which the reader is referred.

With respect to judgment obtained for debts owing

(*a*) 3 P. W. 409. Ca. Temp. Talbot, 173. See also Thomond v. Earl of Suffolk, 1 P. Will. 465—468. *et vide* Sanderson v. Crouch, 2 Vern. 118.

(*b*) Pre. Ch. 255;

(*c*) Page 190, *et seq.*

by the wife whilst single, there is this distinction in regard to the husband's liability.

Actions and judgments against the wife before marriage.

If the judgment be recovered previously to the marriage, and the wife die before the suing out of execution, the husband will be discharged from the demand; but if the judgment had been recovered against both of them, and the wife died before execution, the husband will continue charged; because by the judgment the nature of the debt was altered, and from that time it became his own debt (*a*).

[And for the same reason if judgment be recovered against the wife while sole, and a *scire facias* be brought upon it after the marriage, against the husband and wife, and a judgment be obtained on the *scire facias*, the husband will be charged after the wife's death (*b*).]

When a judgment is obtained for a debt against a single woman, who afterwards marries, the execution upon it must be against her alone, because the execution must follow the judgment. But if it be desired to charge a person with the debt recovered, who was no party to the record, as the husband in this case, a *scire facias* ought to be issued making him a party to it (*c*).

[And if a woman marries pending an action against her, and judgment be afterwards obtained against her alone, execution may issue against her by *capias ad satisfaciendum*, or by *habere facias possessionem*, in an action of ejectment; but her goods, having become the property of the husband, cannot be taken by *fieri facias* under this judgment (*d*).]

(*a*) Obrian v. Ram, 3 Mod. 186. Eyres v. Coward, Sid. 337. Treviban v. Lawrence, 2 Lord Raym. Rep. 1050. (*b*) Obrian v. Ram, *ub supra*, vide *post*, chap. xvi. sect. 5. (*c*) Cooper v. Hunchin, 4 East, 521. The liability of the husband surviving his wife for her devastavit, in consequence of proceedings at law against them, is mentioned in vol. i. p. 201. (*d*) See Doe v. Butcher, 3 M. & S. 557. Cooper v. Hunchin, *ub supra*, and Vin. Ab. Baron v. Feme, K *a*.

II. The effect of the marriage upon the prior acts and agreements of the husband with or in relation to his wife, and his liability to perform such acts and agreements.

In *Ewbank* v. *Hallowell* (*a*), *Lord Thurlow* decided that a legacy given to the wife by her husband's will made before the marriage, was not revoked by such marriage.

Rule, that if a man obligor marry the obligee, the debt is released at law.

1. It is a general rule, where a man marries a woman to whom he is indebted, that the debt is thereby released. But this rule only extends to contracts for debts which are due *in præsenti*, or which *may* become payable at some period *during* the marriage; so that such contracts between the husband and wife, which from their nature can give no right of action during the coverture, are not released or extinguished by it. In order to exemplify this; if the husband obligor take the obligee to wife, the bond is discharged at law (*b*), because husband and wife make but one person in law, which unity of persons disables the wife from suing her husband. But if the husband *before* the marriage give a bond to his *intended* wife, with a condition to avoid it, if *he left her a certain sum of money at his death*, the obligation would not be dissolved by their marriage; for the engagement never ripened into a duty during the husband's life, and it could not have been released by him (*c*). Thus it appears, that the express agreement of the parties created a right not inconsistent with the rules of marriage; so that, although the right be *suspended*, it is *not extinguished* by it.

Exception, when the debt cannot accrue due during the marriage.

The leading case upon this subject (which has also received the additional authority of *Lord Kenyon* (*d*)) is *Cage* v. *Acton* (*e*). There, to an action of debt for

(*a*) 2 Bro. C. C. 220. (*b*) Co. Litt. 264, *b*. (*c*) Smith v. Stafford, Hob. 216. Clark v. Thomson, Cro. Jac. 571. Tylle v. Peirce, Cro. Car. 376. (*d*) 5 Term. Rep. 384. (*e*) 1 Ld. Raym. Rep. 515. See 2 Vern. 480. Prec. Ch. 237.

rent against an administratrix, she pleaded that the intestate, in his lifetime, in consideration of a marriage to be solemnised between him and herself, became bound to her in a bond of 2000*l.*, conditioned for the payment of 1000*l.* within a certain time after the intestate's death, if she survived him. She then averred that the marriage took effect, the death of the intestate, and that the 1000*l.* had not been paid; that she had taken out administration, and that 250*l.* assets came to her hands, which she retained in satisfaction of the bond, &c. Upon demurrer, *Gould* and *Turton*, Justices, were of opinion (*Holt*, Ch. J. *dissentiente*) that the bond was not extinguished by the marriage; so that the demurrer was overruled.

And in the modern case of *Milbourn* v. *Ewart* (*a*), the husband before the marriage gave to his wife a bond conditioned for the payment of 3000*l.* by his heirs or executors at the end of twelve months *after* his death. The Court held that the bond was not released by the marriage, and they approved of the decision in *Cage* v. *Acton*.

Such bonds and engagements as those before mentioned being valid at law and binding the husband's estate, there is no necessity from the contrary fact to appeal to the jurisdiction of a Court of Equity to carry into effect the intention of the parties, which that Court will do when its interference is necessary, as appears from the before mentioned case of *Cannel* v. *Buckle* (*b*); and it seems that the same rules and distinctions apply to covenants entered into by the husband with his wife before marriage, as in the instances of bonds given by him to her (*c*).

Husband's bond before marriage to a *trustee* for wife not released at law by the marriage.

When, previously to the marriage, a bond is given by the husband to a person in trust for his intended

(*a*) 5 Term. Rep. 381. (*b*) *Supra*, p. 72. (*c*) 1 Ld. Raym. Rep. 517. See Doe v. Polgrean, 1 H. Bl. 535.

wife, so that she is *cestuique trust* of such bond; or if she *dum sola* lend money, and take a bond in the name of a trustee, marriage will not in either case revoke it; for in both cases the legal right to sue is in the trustee, and there is no inconsistency between the right of action, and the law arising out of the relation of marriage.

Accordingly, in *Cotton* v. *Cotton* (*a*), the wife, during her subsequent widowhood, lent 200*l.*, part of the assets of her first husband, to *A* the plaintiff's son, who, with the plaintiff as surety, gave a bond to the defendant *B* in trust for the other defendant, the widow, for repayment of the money (*b*). The widow married *A*, one of the obligors, and survived him. The bond having been put in suit, the plaintiff, the surety, filed a bill to be relieved against it, insisting that by the marriage of the *cestuique trust* of the bond with the principal obligor, the bond was released in equity, as it would have been at law, if it had been made to the widow before her second marriage; but the Court refused to relieve the surety (*c*); and the decree was afterwards confirmed by *Lord Somers* (*d*).

(*a*) Pre. Ch. 41. 2 Vern. 290. (*b*) According to Mr. Raithby's note, taken from the Register Book, the bond was given to the wife and her trustee.

(*c*) The Court compared it to the case of a bond given in contemplation of marriage, and relied upon the circumstance of the husband not having procured it to be delivered up. The money was part of the assets of the first husband, and though lent by the wife, was still due to her as executrix. See Webster v. Spencer, 3 Barn. and Ald. 360. It may be doubted, whether the case established generally that a bond given by the husband to a trustee for the wife, will subsist in equity after the marriage, when given for a mere personal debt, and not in contemplation of the marriage. But marriage will not be a release of an equitable demand, to which the husband is subject in a representative character. In Baker v. Hall, 12 Ves. 497, a sole executor married one of the residuary legatees: her share of the residue was held to survive to her, on the ground that the husband's

(*d*) Reg. Lib. 1692. (A) fo. 496.

So also if the wife be executrix or administratrix, and marry a man who is debtor to the estate, the debt is not released by the marriage, because such a construction would have the effect of a devastavit, and it is a known maxim that the law works no injury (*a*).

Marriage of an executrix with a debtor to the estate, no release.

2. Securities given by the husband directly to his wife before and in contemplation of marriage being either good at law or in equity, it follows that either he or his estate is liable to discharge them.

It may happen, in a case where the husband gives a bond prior to marriage to his intended wife, or to a trustee for her, to leave or pay her *after* his death a sum of money, that he appoints her executrix. In that event, she may either retain the amount of the bond against all other debts in equal degree, or she may pay it over to her trustees; but if in the latter case the payment be made with her own money, she has a right of retainer as above; or if she satisfy the debt out of her husband's assets, she will be allowed equal benefit of the payment. The case of *Marriot* v. *Thompson* (*b*) places these matters in a clear point of view:—

Widow's right to retain out of husband's assets his bond before marriage to leave or pay to her a sum of money, she being his executrix.

The action was brought against a widow the executrix of her husband, by one of his bond-creditors; and it appears from the widow's plea, that prior to the marriage her husband gave a bond to two trustees, conditioned to leave to her at his death, if she survived him, 400*l.*; that the marriage took effect; that he appointed her executrix of his will, which she proved; and that the debt was due. She then pleaded *plene administravit, minus 5l.* which she insisted upon retaining in part satisfaction of her bond-debt. The plaintiff demurred; first, because the bond being made

possession was in his character of executor. In this case, it will be observed, that if the husband died intestate, the wife's claim would not be against his representative, but against the administrator *de bonis non* of the first testator.

(*a*) Dorchester v. Webb, Cro. Car. 372. W. Jones, 345.

(*b*) Willes's Rep. 186.

to *trustees*, the widow could not retain, since the money was not a debt due to her at law, but to the trustees. The Court however overruled the objection, observing, that if the money had been directed to be paid *to* the trustees, it would have been fatal to the plea; yet, although in that case she could not have retained, she might have paid the money to the trustees, and insisted upon the payment; or she might have paid it out of her own money, and have retained assets *pro tanto* (*a*); but that, since by the condition of the bond payment was to be made to the widow, she was intitled to retain (*b*); and whether the words were to *leave* or *to pay* to the widow would make no difference (*c*).

[In a late case (*d*), it was held that the widow could not, as administratrix, retain for an annuity secured by her husband's covenant with trustees, and payable to her.

If the husband devises his real estates to his wife, and his personalty be insufficient for payment of his debts, the widow may retain the amount of a sum secured to her by bond or covenant, out of the produce of the estate, as against the other specialty creditors (*e*).]

But the husband may become insolvent and a bankrupt; in which case, his liability to perform his engagements before marriage with or in favour of his wife will undergo a material change, which we shall next consider, having in a preceding chapter treated upon the wife's equities in her own unrecovered choses in action, against her husband and his assignees (*f*).

Proof in bankruptcy under marriage articles.

[If the husband has previously to the marriage bound

(*a*) Dy. 2, *a*. 2 Roll. Abr. 684, pl. 11. Cleydon v. Spensar, Moor 2. (*b*) T. Raym. 483. 2 Show. 403. Skin. 214. (*c*) 2 P. Will. 298. 2 Black. Rep. 965. (*d*) Thompson v. Thompson, 9 Price, 464. Sed vide Loane v. Casey, 2 W. Bl. 965. Anon. cited 9 Price, 473, and 1 Sim. and Stu. 461. (*e*) Loomes v. Stothard, 1 Sim. and Stu. 458. (*f*) Vol. I. chap. vii. p. 268, *et seq.*

himself by bond or covenant for payment of a sum of money to his wife, or to trustees for her benefit, and the sum becomes payable before his bankruptcy, it constitutes a present debt, and may be proved under the commission. Thus, if the sum is to be paid or settled upon the marriage, or as speedily as may be after the marriage (*a*), which in substance is the same, or if it be payable on demand, and a demand be made previous to the bankruptcy (*b*), it may be proved as a present debt. And where the marriage settlement falsely recited that the husband was possessed of 1000*l.* and upwards in trade, and he covenanted that 500*l.*, part of it, should be vested in trustees for his wife and children, and afterwards became bankrupt, it was held that the 500*l.* was a debt proveable under the commission, on the ground that the husband was bound to make good the representation contained in the settlement (*c*).

But the rule was different (previously to the late act for the amendment of the Bankrupt Laws) in cases where the sum had not become payable before the bankruptcy: a future debt could not be proved under a commission, if it was subject to a contingency, or if the time of payment was uncertain (*d*). If the sum was payable at a future ascertained period, free from any contingency, it might be proved (*e*). But if it was payable on a contingency, as in the event of the wife surviving (*f*), or on demand, and no demand was made prior to the bankruptcy, or at an uncertain period (*g*), as on the death of the survivor of the husband and wife (*h*), it could not be proved. But al-

(*a*) Ex parte Granger, 10 Ves. 349. (*b*) Ex parte Campbell, 16 Ves. 244. (*c*) Ex parte Gardner, 11 Ves. 40. (*d*) Ex parte Baker, 9 Ves. 110. (*e*) Ex parte Cottrell, Cowp. 742. Pattison v. Binkes, ibid. 540. See ex parte Mitford, 1 Bro. C. C. 398, and 9 Ves. 114. 3 Mer. 105. (*f*) Ex parte Groome, 1 Atk. 115. (*g*) Ex parte Alcock, 1 Rose, 323. 1 Ves. and B. 176. (*h*) Ex parte Barker, 9 Ves. 110.

though the debt was contingent, if the bankrupt had given a security, constituting an immediate demand against him at law, the proof was received upon the footing of there being a legal debt, the payment of the dividends being arranged upon equitable terms. Thus, if the sum was secured by a judgment against the bankrupt (*a*), or by a bond with a penalty, which had become forfeited by a breach of any part of the condition (*b*), the Court availed itself of the legal right which these securities gave, to admit a proof which in equity ought to be allowed (*c*).

But by the late statute, 6 Geo. IV. chap. 16, sect. 56, in all cases of debts payable upon a contingency, which has not happened before the issuing of the commission, the creditor may, if he thinks fit, apply to the commissioners to set a value upon such debt, and they are required to ascertain the value, and admit the creditor to prove the amount so ascertained, and to receive dividends thereon: or if the value shall not be so ascertained before the contingency shall have happened, the creditor may prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends.]

What securities given by the husband to or in trust for his wife will and will not be considered in fraud of the bankrupt laws.

No person is allowed by any device to counteract the spirit and intention of the bankrupt laws. *Lord Redesdale*, in ex parte *Murphy* (after stated) said, that although he was bound to decide in favour of a debt whether it were legal or equitable, yet that if it appeared to be a contrivance to *evade* those laws, the debt was not conscientious, and no dividend ought to be paid upon it. As to what will be considered such a contrivance, it is presumed, that upon consideration of

(*a*) Ex parte Smith, Cooke's Bank. Law, 212. See 1 Atk. 117.
(*b*) Ex parte Rowlatt, 2 Rose, 416. Ex parte Elder, 2 Madd. 282. (*c*) See 1 Glyn. and J. 115.

all the cases the following distinctions may be established.

A bond with a condition or defeasance to be only sued upon in the event husband's bankruptcy is fraudulent.

If a bond be given by the husband before marriage to pay a sum of money for his wife's use, with a condition or defeasance not to put it in force except upon his failure, or insolvency, or bankruptcy, such a bond will be fraudulent and void against the husband's creditors, and will not be permitted to be proved under his commission (*a*). Upon this point, *Lord Eldon* in ex parte *Cook* (*b*) expressed himself to the following effect:—"If the husband be to give a bond with condition to pay money, in the event of his bankruptcy, there is great difficulty upon the point whether the demand is not fraudulent against creditors. There have been cases both before *Lords Thurlow* and *Rosslyn*, in which each of them held, that if it were not the case of a settlement of part of the wife's property, but a bond by the husband, it would not do."—In ex parte *Hodgson* (*c*), his Lordship was more explicit, declaring, that if the case before him were to be considered merely as the husband's bond, it would not do.

So also if the bond be connected with marriage articles or settlement not including the property of the wife, the result will be the same.

And although the bond be connected with articles or a settlement, yet if the wife's property be not the subject of the settlement, and it appear from the instruments that the intention of the parties was to create a debt merely upon the insolvency or bankruptcy of the husband, so as to create a demand out of his estate, such contrivance and securities will be void against his creditors.

Thus, in ex parte *Murphy* (*d*), the wife of the bankrupt and her trustees under a marriage settlement, petitioned for leave to prove under the commission 800*l.* under the following circumstances: prior to the

(*a*) Ex parte Hill and ex parte Bennet, 1 Cooke's B. L. 228. (*b*) 8 Ves. 355. (*c*) 19 Ves. 206. (*d*) 1 Scho. and Lefroy, 44. See also Higginson v. Kelly, 1 Rose, 368.

marriage a *bond* was given by the bankrupt to the trustees, conditioned for the payment of the above sum on the 3d of *March*, 1796, with a warrant of attorney to confess judgment with a stay of execution till that day. At the date of the bond on the 3d of *October*, 1795, a settlement was executed by the bankrupt and his wife and their trustees, referring to the bond, and covenanting that the 800*l.* should be payable and be sued for only *in the event* of the *wife surviving* her husband. And after reciting that the husband was a trader, it was further covenanted, that in case of failing in his circumstances, but not otherwise, the trustees were empowered to enter judgment on the bond, and to issue execution. The bankruptcy was subsequent to the 3d of *March*, 1796, so that the bond became absolute. *Lord Redesdale* said, he considered the whole device a fraud upon the bankrupt laws; and that under the first mentioned covenant the debt was merely *contingent*, and the subsequent provision in case of insolvency, &c. was fraudulent, an attempt and contrivance to make that a debt in case the husband became bankrupt, which could not be so otherwise; that it was a *contingent* demand for 800*l.* payable only if the wife survived her husband, which was the *only* demand that could be made consistently with the agreement between the parties, provided the husband did not become a bankrupt; that such being the nature of the demand, the *settlement* itself showed that it was intended to contrive, what his Lordship conceived to be a fraud upon the bankrupt laws; for a clause in it noticed the husband being a trader, and that it was necessary to secure something in the event of his bankruptcy: for *that purpose* a bond was to be given payable at a day certain, but the sum was not to be recovered from him unless he became insolvent. As to this sum, therefore, though a *legal* demand, yet on the foundation of the settlement if an attempt were made to sue him upon the bond, or to enter up judgment whilst he con-

tinued solvent, he would have a right to come into a Court of Equity and prevent it, and to have the contract which was the ground of the bond carried into execution by restraining proceedings on the bond. And his Lordship added, that the debt was to be taken as it stood upon the whole of the instruments executed, and the contract in the deed of settlement was that the bond should have no effect but in case of bankruptcy; for it was *not* the bond that was to operate in the event of the husband dying before the wife; it was *not* the bond that was the security to the wife if she survived, nor to the children if she died before her husband, so that the whole effect of the clause was to avoid the operation of the bankrupt laws. For these reasons his Lordship was of opinion that the debt could not be proved, although he could not make an order upon the petition from the irregularity of the application, which ought to have been by the assignees to expunge the debt.

For husband cannot before marriage settle *his* property so, as by express stipulation with a view to future insolvency, to give his wife in that event any part of his property.

In *Higginbotham* v. *Holme* (*a*) the husband, by settlement prior to marriage, conveyed to trustees certain freehold estates to hold after the marriage to the use of the husband for life, *unless* he *should embark in trade*, and *during his wife's life become bankrupt*, and from his death, *or* his being declared a bankrupt, which should first happen, to the use that the wife (if she were the survivor and *B* should be then living) should receive an annuity of 150*l.* during the several lives of herself and of *B*; but if *B* were dead at the decease or bankruptcy of the husband, or should die before the wife, then from such death or bankruptcy of the husband, and the death of *B*, the wife should receive an annuity of 200*l.* for life payable quarterly, the *first* payment to be made on the quarter day *next after* the death or *bankruptcy* of the husband. The annuities

(*a*) 19 Ves. 88.

were declared to be in bar of dower, and the wife's claims upon her husband's real and personal estates, and were to be paid to and for the wife's *separate* use; they were also secured from the death or bankruptcy of the husband by two terms of years created out of his real estates, and subject thereto the ultimate use of the lands was limited to the husband, his heirs, executors, &c. At the marriage the husband was not a trader, nor did he intend to be so, he having been educated for the church, but in 1802 he became a cotton manufacturer, and in *January* 1811, he became a bankrupt, *B* being then living. A bill by the wife claiming the annuity of 150*l.* was dismissed by the Master of the Rolls, from which decree she appealed; and *Lord Eldon* said that the facts were, that the husband at the time of the marriage was not indebted, and had no formed purpose of entering into trade, but having been intended for the church he changed his purpose, entered into trade, and became a bankrupt. The question was, whether a provision of this kind could be sustained against creditors by charging his estate as against their right under the commission with the annuity to which the wife would upon his death have an undoubted title. His Lordship then said, he had vainly endeavoured to apply the principle of those cases which turned upon the fact that a man not indebted nor a trader at the time made a settlement *without reference* to debts to be contracted in future, and to the future event of bankruptcy, but that the present case had no resemblance to those; that the present settlement *looked forward* to a change of intention, to the purpose of becoming a trader, and also expressly to the possible consequences of that purpose, and thus looking forward to such a change of purpose and to such consequences, it was a limitation, by the effect of which the estate would go to the creditors, that change being adopted with the *express object* of taking the case out of the reach of the bankrupt laws. And as to the *consider-*

ation from the covenant of the father, which, although it might perhaps prove worth little or nothing, was to be regarded as a consideration with reference to all the provisions of the settlement; and that although an annuity might have been provided by the settlement for the wife in all events, yet it was not competent for a party giving a consideration for a contract which was a direct fraud upon the bankrupt laws to have the benefit of it. His Lordship then said, that he could not assimilate this transaction to the case of the wife's property limited until the bankruptcy of her husband; nor to that of a lease made determinable by the bankruptcy of the lessee, which was a reservation by the owner of the property of a power over it; nor to the case ex parte *Winchester* (*a*) and others, where, as the contingency happened previously to the bankruptcy, the debt was proveable; nor to the case (*b*) put by *Lord Kenyon*, and observed upon by *Lord Redesdale* (*c*), of a bond payable immediately and given by a trader upon his marriage to trustees to secure a provision for his wife and children. His Lordship, therefore, confirmed the decree (*d*).

But by articles or settlement before the marriage, the wife's property, in which the husband might have had, if not a bankrupt, either a partial interest with her or a separate one, may be limited to her husband until he become a bankrupt, or insolvent, and from either event to the wife's separate use for life, and after her death to the children of the marriage (*e*). In such a case the subsequent creditors of the husband cannot be considered as defrauded, because the wife whilst

But the *wife's property* may be limited by articles before marriage expressly with a view to husband's bankruptcy, so as to determine his interest in it.

(*a*) 1 Atk. 116. (*b*) See Staines v. Planck, 8 Term. Rep. 389. (*c*) 1 Scho. and Le Froy, 48. (*d*) See also Ex parte Oxley, 1 Ball and B. 257, and Ex parte Taaffe, 1 Glyn. and J. 110. (*e*) Ex parte Cooke, 8 Ves. 356. See the form of a settlement containing such a limitation in Append. No. 12.

single dealt only with her own property in contemplation of the marriage, and she was at liberty to settle it in such manner and upon such terms as she and her intended husband pleased. There is nothing improper in her or her friends providing against the insolvency of the husband, and stipulating for a return of her own property for the support of herself and family in the event of such insolvency, by which he is rendered incapable of performing that duty out of his own. The first authority upon this subject was *Lockyer* v. *Savage* (*a*), which has ever since been followed; and in ex parte *Cook*, after stated, *Lord Eldon* said that this doctrine ought to be considered as now settled.

In ex parte *Hinton* (*b*), *Fitz* the husband became bankrupt in 1805, and in 1794 by settlement before his marriage with *Elizabeth Randall*, 540*l.* (her property) was assigned to the petitioner, her trustee, with power to *lend* the money to the husband, and to whom 500*l.*, part of it, was advanced upon his bond, dated in *June* 1794, to be repaid on the 18th of *December* then next. The settlement recited the bond, and declared that if the marriage took effect the bond and money should be in trust, that the trustees (of whom the petitioner was the survivor) should, when they thought proper, recover and receive the principal sum, and pay the *interest* to the husband for life, *if he so long continued solvent;* but *if he became a bankrupt*, then to pay the interest to the wife, if she survived him, for life, for her *separate use*, and to her separate receipt, as if she were a *feme sole;* but if she were then dead, then to permit the 500*l.* to be enjoyed by the children of the marriage, but if no children who attained twenty-one, then the bankrupt was to be intitled to it absolutely. The wife died leaving one child, and to prove this debt was the prayer of the

(*a*) 2 Stra. 947. (*b*) 14 Ves. 598.

petition. And *Lord Eldon* said, that upon the authority of the case in *Strange* (*a*), which had been followed by *Lord Thurlow*, the trustee was intitled to prove this debt upon the *distinction* that this money was part of the wife's property, *not* the bankrupt's. That the case in *Strange* was also an authority that money (the wife's property) might be limited upon the bankruptcy of the husband. That the articles being before marriage, the wife was a purchaser for herself and the issue, who could have no remedy against the trustee.

So, also, in ex parte *Cooke* (*b*), the wife, amongst other property, being possessed of 10,000*l.*, it was agreed, by articles of settlement before marriage, that the sum should be vested in trustees to pay to her separate use 200*l.* a year, and the surplus dividends to the husband, *until he should become bankrupt or insolvent*, and then in trust for her separate use, and after her death for the children of the marriage; but if there were none, then the principal was to belong to the survivor of husband and wife. And it was further agreed, that the residue of the wife's personal estate should be paid to her husband, if living *when she attained* 21, in right of marriage, he first executing a bond, which he covenanted to do, in the penalty of 10,000*l.*, conditioned to pay 5000*l.* at the end of six months from the date of the bond. And it was declared that the bond should be to the intent only, that in case the husband should become bankrupt or insolvent, or if he should at his death be insolvent, then the trustees should forthwith put the bond in force, and be possessed of the money upon the same trusts as were declared of the 10,000*l.*, except that the husband should not be intitled to the interest for life if he survived his wife, but that the principal should go upon

(*a*) Lockyer v. Savage, 2 Stra. 947. (*b*) 8 Ves. 354.

her death, as it would have done on both their deaths; and that no suit should be instituted on the bond, except the husband became bankrupt or insolvent; also, that if he died without having become a bankrupt, &c. the bond should be delivered up, and the 5000*l.* considered part of his personal estate. The marriage took effect, and the wife attained 21, and performed her part of the articles. The trustees proved under the commission the 10,000*l.*, which, with 5000*l.*, the produce from the sale of part of her real estate, and the whole residue of her personal estate, had been received by her husband. And the question was, whether the bond debt of 5000*l.* could also be proved? And *Lord Eldon* determined, that the wife was intitled to prove it, if not for that sum, yet for so much of the residue of the value of the real and personal estate beyond 10,000*l.*, as might constitute any part of that 5000*l.* His Lordship said, that whatever inaccuracy there might be in that, the present was a settlement resting in covenant and articles. The marriage was upon an agreement to be carried into execution by future acts; so that if there were any mode of sufficiently providing against bankruptcy, the Court ought substantially to provide against it in the execution of such an article.

Jurisdiction of Equity to execute articles, so as to provide against husband's bankruptcy.

It appears from the authorities before stated, that although the wife may reserve a power over her own property, and limit it by articles or settlement, so as to retake it to her separate use, or when lent to her husband, a dividend upon it in the event of his bankruptcy; yet that she cannot effect this object at law by accepting a *bond*, with a condition to create a debt on that contingency; the effect of such a security (excluding the consideration of the policy of the bankrupt laws), being, as it presumed, to raise no debt prior to the bankruptcy; none such, therefore, as a *legal* debt, is capable of proof, under the commission. But since *equitable* as well as legal demands may be proved, and

a bond, although void at law, may be good in equity as *evidence* of a contract, if the husband's bond contain sufficient to show an agreement concerning the *wife's property* (as in the next case) and that it should be settled, in the event of her husband's insolvency, upon herself and family, a Court of Equity will support it (so far as the wife's fortune was the consideration) in the same manner as we have seen it will do when the transaction is by settlement, or by bond and settlement; the Court making no difference between the circumstance of the specific property being settled or *lent* to the husband (*a*).

Thus in ex parte *Hodgson* (*b*), *William Lowe*, in contemplation of his marriage on the 6th of April, 1805, gave his bond to a trustee in the penalty of 700*l.*, reciting his intended marriage with *Mary Orme;* in consequence whereof, and of *the property which she was intitled to under the will of her father*, it was *agreed*, that after the marriage, in case of the *insolvency* of *Lowe* at any time during their several lives, it should be lawful to *William Bailey*, the trustee on behalf of *Mary Orme*, to come in under any assignment or commission of bankruptcy as a creditor, and to make proof, as well of the sum of 500*l.*, as of so much beyond that sum as could be ascertained, that *Lowe* should have received as the distributive share of *Mary Orme* in the personal estate of her father, and receive dividends, &c.; and that the dividends when received should be paid and applied to the only proper use and behalf of *Mary Orme*, and not in any manner to be subject or liable to the debts, power, or control of her husband; and that *Lowe*, if his wife survived him, should leave by will, or give by settlement, an annuity of 50*l.* to her for life; and in case of children, should

(*a*) 8 Ves. 357. 1 Buck, 187. (*b*) 19 Ves. 206. See also ex parte Young, 1 Buck, 179. 3 Mad. 124.

give so much of her fortune as he should have received, among them equally, and declaring the condition of the bond accordingly. *Mrs. Lowe* was intitled to a legacy of 500*l.* under her father's will, and to 80*l.* under the will of her brother, who bequeathed the residue of his personal estate equally among his sisters. Both sums were received by *William Lowe*. On the 28th of *August*, 1811, a commission of bankruptcy issued against *Lowe*. The trustees attempting to prove the 500*l.* and 80*l.*, a claim was admitted; and the petition, presented by the assignees, prayed, that it might be expunged; and *Lord Eldon* decided that the 80*l.* could not be proved. And with regard to the other sum, he said, he never saw such a security, it not providing that it should be forfeited if the party became insolvent; on the contrary, that it was a bond in a certain sum, with a condition, that if the husband became insolvent, the party should prove and receive dividends under any commission of bankruptcy; that he looked upon it as a *marriage agreement*, that the property of the wife, payable on her marriage, and to which she might become intitled from her father, was what the husband was to have the use of until his bankruptcy or insolvency. His Lordship said, that if the stipulation were that the husband should possess his wife's estate, subject to return it in case he became a bankrupt, that would do; for it was clear in that Court, that her estate might be limited to him until he became bankrupt. The Court's declaration was, that proof of the 500*l.* might be admitted; although *in form* a bond, it was an *agreement* as to her estate, that it should be enjoyed by the husband till he became a bankrupt, and was to be considered, therefore, as a limitation of her estate until his bankruptcy. The claim of the 80*l.* was struck out.

Power of a Court of Equity to correct a *settlement*.

In ex parte *Cooke*, before stated, *Lord Eldon* alluded to the power of a Court of Equity so to execute articles, or an executory agreement, as consistently

with the intention of the parties, to provide substantially against the husband's insolvency; but whether the Court had such a power to alter or modify a settlement, a *deed executed* and *complete*, and having nothing executory about it, in order to effectuate such intention, seems to have been doubted previously to the year 1810, when, for the purpose of settling the question, *Lord Manners*, Chancellor of *Ireland*, consulted *Lords Eldon* and *Redesdale* upon the following case, whether, when it appeared that the intention, upon executing a settlement, was that the fortune of the wife should be a provision for her, but by *mistake* it was *made to appear* the property of the husband, it was their Lordship's opinion, that the deed of settlement could be so far corrected to meet the intention of the parties, as to amend the *mistaken form* of the deed, and mould it so as to be a valid settlement? Both opinions having agreed in the power of a Court of Equity to make such correction and alteration, *Lord Manners* acted upon them, and the point appears to be now so settled (*a*).

Lien on wife's estates conveyed to the husband, for money covenanted to be paid by him in consideration of that conveyance.

[In a late case (*b*), a marriage settlement recited that the intended wife was intitled to freehold, leasehold, copyhold, and personal estate, of the value of 4000*l.*; and that upon the treaty for the marriage, she had agreed to convey, assign, and surrender, the freehold, leasehold, and copyhold estates to the husband, in consideration of which he had agreed to pay 4000*l.* to the trustees: the wife then conveyed and assigned the freeholds and leaseholds, and covenanted to surrender the copyholds to the husband, his heirs, &c.: the husband covenanted within six months to pay 4000*l.* to the trustees, to be settled in trust for him-

(*a*) Higginson v. Kelly, 1 Ball and Beat. 253—256. Ex parte Verney, ibid. 260. See *post*, chap. 8, sec. 2. (*b*) Ex parte Dicken. 1 Buck. 115.

self for life, and after his death, for the benefit of the wife and children of the marriage. The copyholds were not surrendered, and the money was not paid: but the wife afterwards joined with the husband in a sale of part of the freehold estate, and on that occasion levied a fine of the whole, declaring the uses of that part to the purchaser, but without declaring any uses as to the remainder. She afterwards joined in another fine, pursuant to a covenant in a trust deed executed by the husband: the trust deed being an act of bankruptcy, a commission issued against the husband. It was held that the trustees had a lien upon the freehold and copyhold estates remaining unsold, for the 4000*l.*, as being the purchase-money agreed to be paid for them, and that they might prove under the commission, for so much as those estates should be insufficient to pay. The copyholds, not having been surrendered, were at law vested in the wife, and could not be claimed by the assignees without performance of the husband's covenant (*a*). The fines could not affect the interest of the children, and were inoperative as against the wife with respect to the lands remaining unsold, no uses having been declared of the first, and the trust deed leading the uses of the second having become void.]

(*a*) See vol. 1, p. 299, and Basevi v. Serra, cited there.

CHAPTER XVI.

THE DISABILITIES OF COVERTURE, AND THE EXCEPTIONS TO THEM.

THE subjects treated of in this chapter, are

I. *The execution of* powers *by the wife, their kinds, and the suspension and merger of them.*
II. *The surrender of leases by her without levying a fine.*
III. Purchases *by her of real property; her receipt and payment of money, and her competency to negotiate or alter securities.*
IV. *The husband's liability to answer for* debts *contracted by his wife for necessaries, and his exemptions from the obligation of maintaining her, and*
V. *Of her own responsibility in such cases; and of her suing and being sued as a* feme sole; *also the peculiarities attending her situation when a* feme sole trader *of the City of London.*

The disabilities attending marriage are created by policy of law, for two reasons; first, to prevent, so far as can be by human precaution, the regard which the wife is supposed to entertain for her husband, and his influence over her, from stripping her of all her property during the marriage; and secondly, to exempt the husband from her acts and engagements to which he was not privy and consenting; for if she (who of the two is reasonably presumed to be the most exposed to imposition) were allowed to bind the husband by her *sole* acts, the consequences might prove ruinous to both

of them and their family. Upon this principle it is (as before appears) (*a*), that the wife is not permitted to take upon herself the office and responsibility of an executrix or administratrix, without her husband's concurrence. The same principle also founded this general proposition, that the *sole* deeds of married women are void (*b*). If, therefore, a married woman execute and deliver a deed to a person as an *escrow*, and the husband die, and then the grantee perform the condition upon which the person to whom the deed was delivered gives it to the grantee as the woman's deed, it is void (*c*); and for this reason, because the instrument receives its inception from the first delivery, and its completion upon performance of the condition; and the *second* delivery is merely the execution and consummation of the first (*d*), so that the grantor or donor being under the disability of coverture at the time of the *first* delivery of the deed, the subsequent death of the husband, before the compliance of the grantee or donee with the terms of it, will not remedy the original defect; but if the wife had been single at the period of the first delivery, and afterwards, but before the grantee or donee complied with the conditions upon which it was to be his deed, she took a husband, the marriage would not defeat the deed; for the instrument commencing in effect from the *first* delivery amounted by relation to the deed of a *feme sole* (*e*).

Distinction when a deed as an escrow is delivered by a woman *before*, and when *after* marriage.

Except by fine or recovery (as has been noticed in a former part of this work) (*f*), a married woman is not allowed, by the general common law, to part with or incumber her own freehold estates, nor to give up any interest which she has in her husband's real property. And although the wife is in most cases a necessary

Wife joining in a fine or recovery, is bound by the deed leading or declaring the uses, though no party to it.

(*a*) Vol. i. p. 188. (*b*) Perk. sect. 6. (*c*) Perk. sect. 11.
(*d*) 5 Rep. 84 *b*. 1 Ves. jun. 275. (*e*) Perk. sect. 9.
(*f*) Vol. i. p. 139.

party to the instrument affecting her estate, yet if she join with her husband in levying a fine, or suffering a recovery (*a*), and be no party to the instrument declaring or leading the uses, she will nevertheless be bound. One of the points decided in *Beckwith's* case (*b*) was to the above effect; viz. that if husband and wife levy a fine of real estate, the property of the wife, and the husband *alone* declare the uses, the declaration will bind the wife if her dissent do not appear; for it will be inferred, that when she joined with her husband in the fine, she also agreed with him in declaring the uses of it.

As to execution of *powers* by wife over *real* estates which do not affect her interest.

I. It seems to be a natural deduction from the principles upon which the disabilities of coverture are founded, that those cases must be excepted out of the general rule, in which the interests of the husband and wife are not in the least affected by her separate acts.

She may, therefore, execute a mere *authority*, whether it be given before or after marriage, for that has no operation upon any interests belonging either to herself or to her husband, and she is no more than the *instrument* of another person; so that a power given to her to convey another's estate, may be executed by her without her husband's concurrence, and even in his favour (*c*); or he may join with her in the execution of a power given to her (*d*), unless the power require her execution of it *dum sola* (*e*). In the exercise of this authority, the wife, as a *feme sole*, may do every necessary act; for whatever she is obliged to do, will be considered, not as her own, but as the acts of her

Husband's concurrence unnecessary,

and the wife alone is competent to do all necessary acts for executing the powers.

(*a*) Lusher v. Bambong, Dy. 290, *a.* (*b*) 2 Rep. 57. See also Swanton v. Raven, 3 Atk. 105. *Ante*, vol. i. p. 140. (*c*) 2 Ves. sen. 610. (*d*) Bayley v. Warburton, 2 Com. 494, 496. Tomlinson v. Dighton, 1 P. Will. 149. (*e*) The Marquis of Antrim v. the Duke of Buckingham, 1 Eq. Ca. Abr. 343, pl. 4. 1 Ch. Ca. 17. 2 Freem. 168, cited from the Registrar's Book, B. 1662, fo. 377, in Bridgman's Judgments, by Bannister, p. 617.

principal; and when such power is given to her *dum sola*, or when married, a subsequent marriage will not suspend it (*a*).

When wife has an interest in the estate distinct from the power, she may alone execute the power.

When both an *interest* and an *authority* pass to the wife, if the authority be collateral to, and do not flow from the interest, she may execute the authority *alone*, because the interest and the authority are distinct, and to be considered the same as if they were in different persons. As instances of the above several propositions,

If lands be given to a woman whilst single, who afterwards marries, or during her marriage, upon *condition* to sell or to convey them to another person, she alone may perform the condition (*b*). The law is the same of a *power* as before mentioned; so that if under a deed or will the wife take as tenant for life, with a general power of appointing the fee, she may make the appointment alone, for neither she nor her husband has any beneficial interest in the inheritance, and the appointee takes the estate under the deed or will (*c*). Again,

If the wife be tenant for life, with remainder to such uses as she shall appoint, and in default of appointment, to herself in fee, she *alone* may by appointment *defeat* her own remainder; but she cannot, by an instrument independent of her power, convey away her remainder without the concurrence of her husband in a fine or recovery (*d*). Upon the same principle, if she be tenant for life, with a power of leasing, she *alone* may exercise the power (*e*), but she cannot, without a fine, *grant* such a lease or leases, if she have not resort to the execution of her power.

As to wife's execution of a power over lands when under age.

Suppose the wife to be under age, she may never-

(*a*) Burnett v. Mann, 1 Ves. sen. 156. (*b*) 2 Roll. Rep. 68. Br. Cui in vitâ, pl. 15, and Dev. pl. 12. (*c*) Daniel v. Upton, Noy's Rep. 80. 1 Sir W. Jones, 137. 1 P. Will. 149. (*d*) 2 Ves. sen. 191. (*e*) Sec 2 Com. Rep. 496.

theless execute a mere power that does not affect her interest: to this effect *Lord Hardwicke* expressed himself in *Hearle* v. *Greenbanke* (*a*); "When an infant," said his Lordship, "is a mere instrument or conduit pipe, and his interest is not concerned, he may execute the power delegated to him. Before the statute of *uses*, the power was over the use; therefore, all things necessary to be done over legal estates were done by way of conditions, and this was the method of exercising an authority over the legal estate; and at law an infant might perform a condition where it was for his benefit." But it seems that no power, except that of the legislature, can enable an infant to part with any interest which it has in freehold property.

With respect to the extinction of powers, their suspension and merger, the following propositions appear to be authorised by the cases, and are necessary to be adverted to, as applying to powers granted to the wife, or to her and her husband.

Of powers collateral.

When the person to whom the power is given takes *no* interest in the estate, nor had any at the time when the power was created, the power is termed *collateral* to the estate; and neither the owner of the lands, nor the donee of the power, can by fine, feoffment, recovery, or otherwise, destroy such power.

Accordingly, if husband or wife have a power to sell the estate of *B*, or to revoke the uses which had been declared of it; the power may be executed, although the owner of the estate, or the donees of the power, had previously levied a fine, or suffered a recovery of the lands, because the power is quite distinct from and independent of the estate (*b*).

Of powers in gross.

When the grantee of the power takes an *interest* in

(*a*) 3 Atk. 710. See Grange v. Tiving, Bridgman's Judgments, by Bannister, p. 106. (*b*) Willis v. Shorral, 1 Atk. 474. Co. Litt. 265 *b*. Digges' case, 1 Rep. 174.

the property, as for life, with authority to appoint the estate after his or her death among such of the children of *B* as he or she may think proper, or to create a term to raise portions for younger children, or to jointure a wife after his death, &c. these powers are called powers in *gross*, and do not affect the interest of the tenant for life, nor arise out of it, so that they may be exercised although the appointor previously part with such interest for life by lease and release, or other conveyance, which from their natures do not destroy or displace the whole of the old estate and all its incidents (*a*); but it is presumed that if the grantee make a feoffment, levy a fine, or suffer a recovery, previously to the execution of such powers, those acts will destroy them (*b*); and that a release, properly framed for the purpose, will have the same effect (*c*). But the *acceptance* of a feoffment by tenant for life will not extinguish any of these powers, for they were not in the feoffor to destroy; and if an appointment be made after such acceptance, the estate created by the power will be reduced upon the entry of the person in remainder (*d*). Also if the execution of the power be made by deed and fine, the fine will not extinguish it, for the deed and the fine will be considered as one transaction and assurance, and operate as an execution of the power (*e*). And it is immaterial whether the deed be prior or subsequent to the time when the fine was levied (*f*).

Another instance of a power in gross is where the settlor, at the time of creating the power, reserves to

(*a*) Edwards v. Slater, Hard. 410. Phitton's case, cited Hard. 412. (*b*) Saville v. Blacket, 1 P. Will. 777. King v. Melling, 1 Ventr. 225. Edwards v. Slater, Hard. 410. See Smith v. Death, 5 Madd. 373. Jesson v. Wright, 2 Bligh, 1. (*c*) Albany's case, 1 Rep. 110 *b*. 2 Atk. 567. (*d*) Hard. 417. (*e*) Thomlinson v. Dighton, 10 Mod. 71. (*f*) Wigson v. Garret, 2 Lev. 149. Raym. 239. 1 Ventr. 278. S. C. Herring v. Brown, 2 Show. 185.

himself an authority to revoke all the uses, and takes no other interest in the estate. If he levy a fine to the tenant for life, the power will be released and extinguished (*a*).

Of powers appendant or appurtenant.

If an estate for life be limited to a stranger, with a power of revocation, or a power to grant leases in possession, or to make an immediate charge upon the property, such powers are denominated *appendant* or *appurtenant*, because they append or belong to the particular estate for life, and operate upon or in respect of it. Whatever, therefore, affects the estate for life must also affect such powers; so that when the power is to revoke the uses, but instead of doing so, the tenant for life creates a charge, lease, &c.; such acts, although not an execution of the power, will take effect out of his interest for life; and he will not be permitted to defeat them by an execution of his power, but subject to them he may execute it (*b*). And if he, by any means, part with his whole estate, the power will be destroyed, for the interest must share in the fate of the principal (*c*); so that a conveyance by tenant for life of his estate, to which is annexed a power of leasing in possession, or a conveyance or disposition of it by operation of law, as in the case of bankruptcy, &c. will extinguish such power (*d*). But in *Ren* v. *Bulkeley* (*e*), the Court held that the conveyance of the life-estate to a trustee and his heirs upon trust to apply the profits in payment

(*a*) Bird v. Christopher, Sty. 389. (*b*) Goodright v. Cator, Dougl. 477. Yelland v. Ficklis, Moor's Rep. 788. Doe v. Britain, 2 Barn. and Ald. 93. (*c*) But the power is not destroyed by a fine, levied for the purpose of affecting limitations subsequent to the estate to which the power is appendant, and declared to enure in confirmation of the previous uses. Earl of Jersey v. Deane, 5 Barn. and Ald. 569. See Roper v. Halifax, 8 Taunt. 845. Sugden on Powers, 641, 3d ed. (*d*) Cooke v. Bromehill, Noy, 66. Lofft. 71. (*e*) Dougl. 292. Sed vide Vincent v. Ennys, 3 Vin. Abr. 432, pl. 10.

of an annuity to *B*, whilst the tenant for life lived, and the surplus to himself, was not an extinguishment of the power. This case is a *legal* decision upon an *equitable* principle, viz. that although the whole legal estate for life was transferred, yet as it was so, for the purpose only of letting in a *particular* charge, it should not have the *legal* effect of extinguishing the power. But however just this decision might be in a Court of Equity, it seems difficult to support it in a Court of *Law* (*a*).

Another instance of a power appendant is when the inheritance is limited to *A* in default, and until the execution of a power given to him to appoint the fee to such uses as he may think proper. If, therefore, *A* convey away his interest, the power will be gone, because he having the ultimate limitation in fee vested in him subject to the power, and being at liberty either to dispose of it by appointment, or as owner of the fee, if he chose the latter he cannot afterwards execute the former; and if the conveyance be by fine or recovery, the power becomes extinct by the effect of those acts (*b*). But when the ultimate limitation in fee is not executed in *A*, as where his estate for life is *legal*, and the power is to appoint to uses, and the estate subject to the power is vested in trustees upon *trust* for his right heirs; there, as the heir must take the ultimate limitation as a purchaser, *A* can only defeat it by a due execution of his power; and if he part with or destroy his estate for life, the power will be extinguished (*c*).

Merger.

Great difference of opinion has prevailed upon the *merger* of the power when the fee subject to it was limited to the donee of such power. Some of the cases have determined that the power merged in the fee (*d*);

(*a*) See vol. i. p. 136. (*b*) Penn v. Peacock, Forrest, 41. (*c*) Parkes v. White, 11 Ves. jun. 209. (*d*) Cross v. Hudson, 3 Bro. C. C. 30. Goodill v. Brigham, 1 Bos. and Pull. 192.

while others that the fee vested in the donee *sub modo*, viz. subject to be devested upon a due execution of the power; and this appears to be the right determination (*a*). The ground of the former opinion was that the power and the fee could not subsist together in the same person. The principle of the latter cases is, that there is no impropriety in holding that the power and the fee may remain distinct, for that a power being an authority to be exercised through the medium of the statute of uses, when it is executed, the appointee takes under the instrument creating such power, as if he had been originally named in it, and not under the appointor to whom in default of appointment the fee is limited; but supposing the power not to be executed, the person claiming the fee limited to the donee of the power in default of his appointment, either by conveyance from him or as his heir, derives all title to it from such donee, as to the inheritance of any other estate which belonged to him. It appears, therefore, that the power and the fee may well subsist together without being merged. This distinction is exemplified by *Lord Eldon* in *Maundrell* v. *Maundrell* (*b*). "When (said his Lordship) a vendor recites his power, executes it, and conveys by feoffment bargain and sale, or lease and release, he professes both to execute his power and pass his interest. Suppose the lease for a year was not executed, having been forgotten, or it had not a proper stamp, the release would have no operation, but the *execution* of the *power* would have limited an use to the persons named, and the use would ingraft itself upon what *Mr. Booth* calls *scintilla juris* in the releasees; and the persons named in the exe-

(*a*) Clere's case, 6 Rep. 17 *b*. Cox v. Chamberlain, 4 Ves. jun. 631. Roach v. Wadham, 6 East. 289. Maundrell v. Maundrell, 10 Ves. jun. 246. Ray v. Pung. cited *ante*, vol. i. p. 366.

(*b*) 10 Ves. 255.

cution of the power would have taken precisely as if they had been persons to whom uses were limited in the original deed. Take the ordinary case of a marriage settlement, with a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years is almost as inconsistent with his interest as a power to limit the fee with that of tenant in fee. But when the tenant for life executes the power, the effect is *not* technically making a lease, but that lessee stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations."

If, therefore, an estate were given to a married woman in fee with a power, annexed to or preceding such limitation (*a*), to dispose of the fee as a *feme sole*, such power would be valid, and upon the execution of it the fee which till appointment vested in her would be devested (*b*).

[In a late case (*c*), a question was raised, whether a married woman having a power of appointment over real estate, to be exercised by deed attested by two witnesses, could be compelled to exercise it in favour of a person to whom she and her husband had agreed to sell. The Master of the Rolls expressed an opinion that a specific performance of her agreement could not be compelled: she was relieved from the disability of coverture to the extent of enabling her to appoint by an instrument executed with the required formalities: without them it was only the agreement of a married woman, and as such invalid.]

Wife empowered to surrender old and take new leases without a fine levied by her.

II. The like principle which induced the legislature

(*a*) 4 Term. Rep. 177. (*b*) Abbot v. Burton, 11 Mod. 181. And see further upon Powers, chap. 19. (*c*) Martin v. Mitchell, 2 Jac. and Walk. 413. See 1 Bro. C. C. 21.

to interfere and authorise the granting of leases of the wife's estate for three lives or twenty-one years (and before considered (*a*)), has influenced the same power to remove the disability of coverture in instances when the wife is seised or possessed of leasehold property for lives or for years, so as to enable her, or any other person on her behalf, to surrender the old and take new leases, without the expense of levying a fine. In order to effect these purposes it is enacted by statute 29 George 2 (*b*), that in all cases where a married woman was, or should become intitled to, or interested in, any lease or leases for life or lives, or for years determinable upon a life or lives, or for years absolutely, she, or any person or persons on her behalf, might apply to the Courts of Chancery or Exchequer, or to the other Courts of Equity in England, or of Great Session of the Principality of Wales, by petition or motion; and that, by the order and direction of any of those Courts, she might by *deed* only, without levying a fine, *surrender* such lease or leases, and accept and take in her own name, and for her own benefit, a *new* lease or leases during such number of lives, or for such number of years determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise as those Courts should direct. And the act declared that the fines for renewal, and the incidental charges should, unless otherwise paid or secured, be, together with interest, a charge upon the leasehold premises, for the use and benefit of the persons advancing the same; and that the renewed leases should operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions as the surrendered leases. And it was also declared that every such surrender, and the

(*a*) Vol. i. p. 95. (*b*) Chapter 31.

leases granted thereupon, should be as legal and valid, as if such surrender had been made by or on behalf of a person unmarried (*a*).

As to purchases by wife of real property.

III. So jealous is the law lest the wife by any act should occasion injury to her husband, that it disables her from binding him without his privity and concurrence with any contract and its consequences. If, therefore, she purchase an estate without her husband's knowledge, and he afterwards disagree to it, he may recover the purchase money from the vendor in an action of *trover* (*b*); but his assent to the transaction will confirm it so far as he is interested; yet after his death, if the wife survive him, or if she make no election, and die before him, her heirs may disaffirm the purchase; so that her right of election is transmissible to the persons or person claiming by descent from her: and it must be noticed, that the wife is a person by law enabled either to purchase or to accept an estate; therefore, subject to the approval or disagreement of her husband, it vests in her in the mean time (*c*). Upon the same principle, if the husband make an exchange of his wife's lands, she or her heirs may avoid it after his decease (*d*). Her election in regard to leases, &c. granted of her estate, has been noticed in a former part of this work (*e*); and if the wife, after her husband's death, enter upon the estate made to her during the marriage, and take the profits, that will be an assent and confirmation (*f*).

Their validity depends upon husband's assent or dissent.

Wife may avoid the purchases by dissent after his death, or may confirm them.

Wife's receipt and payment of money, void against her husband, unless she act under his authority.

The same reason, which induces the law not to allow the wife to affect her husband by the purchase of lands without his consent, occasions also her incapacity to receive or dispose of money without his concurrence.

(*a*) See the form of such a surrender in Append. No. 13.
(*b*) Granby v. Allen, 1 Ld. Raym. Rep. 224. Comberb. 450, S. C.
(*c*) Co. Litt. 3. (*d*) Co. Litt. 51. 1 Roll. Abr. 811.
(*e*) Vol. i. p. 91. (*f*) 3 Rep. 26 *a*.

Accordingly, payment of a legacy bequeathed to her generally, and not given to her separate use, will be a void payment as to her husband (*a*); and the law is the same in regard to rent, money, &c. (*b*). But the wife may act as her husband's agent or attorney. If, therefore, he authorise her to receive and pay money, or if she be accustomed so to do with his permission (which is an implied authority), he will be bound by such her acts (*c*).

Neither can she release a debt, nor give or negotiate any security.

So, also, if the husband desire money to be *lent* to his wife, payment of it to her will bind him; and he will be liable to make satisfaction to the creditor in an action of *assumpsit* (*d*); because this amounts to an express contract by the husband to pay the money, and an assent that the wife should receive it.

The law, with the same view of protection to the husband, as before noticed, disables his wife, without him, to suspend, alter, or release any debt made payable to herself generally, or to give, indorse, or assign a promissory note or other security.

Thus, in *Rawlinson* v. *Stone* (*e*), *Dennison*, J., said, that if a note of hand were made payable to a single woman, who afterwards married, she could not indorse and assign it; and he cited a case of *Connor* v. *Martin* (*f*), of which he had taken a note: it was an action by the indorsee of a promissory note payable to *Susan Connor* or her order, and given to her before marriage, and which, after marriage, she indorsed to the plaintiff. The defendant pleaded that *Susan* was married at the time of making the indorsement. The plaintiff demurred, and the question was, whether the plaintiff could maintain the action upon the note indorsed by a married woman? The whole Court were of opinion

(*a*) Palmer v. Trevor, 1 Vern. 261. (*b*) 2 Wils. 3. Tracy v. Dutton, Palm. 206. (*c*) Palm. 206. Seaborne v. Blackstone, 2 Freem. 178. (*d*) Stephenson v. Hardy, 2 Wils. 368. (*e*) 3 Wils. Rep. 5. (*f*) In C. P. Easter, 8 Geo. 1.

that the wife could not assign the note, because by the act of law it became the sole right and property of the husband.

And in *Brown* v. *Benson* (*a*), the defendant and an other person gave a bond to the plaintiff (the husband) conditioned to pay to his wife an annuity of 26*l.* quarterly for eleven years. The plaintiff being in embarrassed circumstances, left this country shortly after the date of the bond; and the obligors having advanced on his account money to the amount of 25*l.* 5*s.*, they, during the husband's absence, agreed with his wife, that she should give up five years' annuity, and consider it as paid for that period in satisfaction of the advancements; and she signed a receipt accordingly. The jury found that the advancements were made for a debt of the plaintiff, and for his benefit. The question was, whether this agreement between the wife and the obligors was binding upon the husband? and the Court held in the negative; because the bond had no further operation than to give the wife an authority to receive the payments as they became due, which she could not transfer nor anticipate.

If, however, the wife be accustomed to sign instruments for her husband, or with his permission, it seems that the law (as before mentioned) will presume that she acted as his agent in other similar cases; and then such acts will bind him (*b*).

IV. The law, with a view to the safety of the husband, further disables the wife from making any personal contract or incurring any debt to bind him without his concurrence or authority (*c*). But there are exceptions to this rule.

Wife disabled to contract to bind her husband without his authority.

1. One exception arises from the circumstance of

(*a*) 3 East, 331. (*b*) Bowyer v. Peake, 2 Freem. 215. See Cotes v. Davis, 1 Campb. 485. Barlow v. Bishop, 1 East, 434.
(*c*) Gilb. Law of Evid. 183. 4 Leon. 42. 15 East, 607.

their cohabitation. If, therefore, whilst husband and wife live together, she order goods, the *primâ facie* presumption will be, that she did so as her husband's agent or attorney (*a*); and more particularly so, if she have been permitted by him to purchase articles for the use of the house and family (*b*). Indeed, either the express or implied authority of the husband (*c*) is

When such authority implied.

(*a*) Bull. N. P. 134. Langfort v. Tyler, Salk. 113. (*b*) 1 Sid. 128.

(*c*) The rule is thus laid down in a late case by Mr. Justice Bayley. "If a man without any justifiable cause turn away his wife, he is bound by any contract she may make, for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife except where there is reasonable evidence to show that the wife has made the contract with his assent. Etherington v. Parrott, Lord Raym. 1006. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised." 3 Barn. and Cress. 635.

Thus the husband's liability may arise from his improper refusal or neglect to supply his wife with necessaries, or from the contract having been made by the wife as his agent.

In cases depending on the first of these grounds, the husband's assent to the wife's contract, for the purchase of articles of necessity is implied by a fiction of law, founded on his duty to provide such articles for her, and independent of any evidence from which it can be inferred as a fact that she had his authority to bind him. Hence he is not discharged from this liability by showing that the contract was in fact made without his authority and contrary to his wishes, as by proving a general advertisement, or particular notice to individuals not to give credit to his wife. Harris v. Morris, 4 Esp. 41. Boulton v. Prentice, Selw. N. P. 281, 6th Ed. 2 Strange, 1214. So he is liable for expenses incurred by his wife in exhibiting articles of the peace against him, when rendered necessary by his conduct. Shepherd v. Mackoul, 3 Campb. 326. On the other hand, as this liability arises from his duty to maintain his wife, it is open to him

the test by which all cases must be determined in regard to the husband's liability to answer for his wife's engagements whilst they cohabit; for a married woman cannot make any contract to bind her husband, except by his express or implied authority (*a*).

For necessaries.

Upon this principle, since the husband is bound to supply his wife and family with necessaries, such as lodging, clothes, and subsistence, if she contract for, or purchase necessary food and apparel, whilst living with her husband; or if she incur debts for her own necessaries, when he neglects to provide them, whilst they cohabit; his authority to her, as his

to discharge himself by showing, that that duty no longer exists, as in cases where the wife by adultery or elopement has forfeited her right to his protection, or by showing that that duty has not been neglected, as in cases where the wife is adequately provided for. See Liddlow v. Wilmot, 1 Stark. 86, and *post*, chap. 22, sect. 4, pl. 3.

In cases of the second class, the wife's authority to contract in the name of her husband is either proved, or inferred as a fact from the circumstances and the relation between them. The circumstance of cohabitation is sufficient presumptive evidence of an authority to contract for necessaries, and her contracts will bind him to a greater extent, if the evidence warrants the inference that a more extensive authority has in fact been given. The same reason applies to render a man liable for the debts of a woman with whom he cohabits, holding her out to the world as his wife. Watson v. Threlkeld, 2 Esp. 637. Robinson v. Nahon, 1 Campb. 245. See Munro v. De Chemant, 4 Campb. 215.

In all cases, the husband will be discharged, if it appear that the goods were not supplied on his credit, but that the party supplying them trusted to the wife. Metcalfe v. Shaw, 3 Campb. 22. Bentley v. Griffin, 5 Taunt. 356. Thus, where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessaries supplied to her, the tradesman having trusted to her promise to pay him out of her allowance. Holt v. Brien, 4 B. and A. 252. See Montague v. Benedict, 3 Barn. and Cress. 631. As to cases where the husband's liability is discharged by a separation deed providing an allowance for the wife, see *post*, chap. 22, sect. 4, pl. 3.

(*a*) Marshall v. Rutton, 8 Term. Rep. 545.

agent, to procure them for her own use, will be implied by the law, and he will be obliged to pay for them (*a*).

If suitable to her and husband's circumstances.

But this implication or assumption will be repelled if, whilst husband and wife live together, the articles purchased by the wife are not such as can be classed amongst those which may be considered necessaries; so that, in the absence of the husband's express authority, it appears requisite to prove, with a view of fixing liability upon him, that in other instances of the like kind the wife was in the habit of purchasing similar articles with the concurrence of her husband (*b*); for if the goods are unsuitable to her rank in life, either in kind or quantity, and to her husband's circumstances, his authority for the contract or purchase will not be implied (*c*). But what will be considered necessaries, exclusive of board and lodging, are such articles as comport with the wife's situation in life and her husband's fortune, and which are usually worn or possessed by persons in similar conditions of life.

What considered to be necessaries.

Thus, in *Berreblock* v. *Michael* (*d*), it was objected against the consideration, because the declaration was, in regard to *Lord Burgh* (the husband), that he was indebted to the plaintiff in *25l.* for *plate* sold and delivered to *Lady Burgh*, to *his* use; but that there was no averment that the husband agreed thereto, or that it came to his use. But as the plate was *necessarily* to be intended to have come to the husband's use, or to have been bought with his consent, the Court overruled the objections.

Medicines, medical attendances, and reasonable ex-

(*a*) Dier v. East, 1 Ventr. 42. Beaumont v. Welden, 2 Ventr. 155. Manby v. Scott, 1 Bac. Abr. 488. 1 Mod. 124. 1 Sid. 109, S. C. 1 Roll Abr. 351, pl. 5. Bridgman's Judgments, by Bannister, 229. Stone v. Walter, ibid. 618. (*b*) Morton v. Withens, Skin. 349. (*c*) Montague v. Benedict, 3 Burr. and Cress. 631. (*d*) Cro. Jac. 257, 8.

penses incurred during illness, fall within this exception (*a*); and the determination of each particular case, as to what are and are not to be considered necessaries, belongs to a jury.

If the articles bought be not necessaries, yet if they come to husband's use, &c. he will be liable.

2. Another exception to the rule, in respect of the wife's disability to contract, happens when the goods purchased by her (to the payment for which the husband would not be liable) come to her or her husband's use with his knowledge and permission, or when he allows the wife to retain and enjoy them. In such cases the law considers the wife as her husband's agent, and implies a promise on his part to pay for the articles. So also when the husband permits his wife to assume an appearance beyond his ability to support, the like authority and promise will be presumed (*b*).

Whether husband be liable if the wife borrow money to pay for necessaries.

3. A third exception is, when the wife purchases necessaries and pays for them with *money borrowed* by her, from a stranger, for the purpose. Although at law, as appears from the case of *Earle* v. *Peale* (*c*), such a loan could not be established against her husband, yet upon proof of the money having been properly applied, a Court of Equity will interfere, and allow the creditor to stand in the place of the persons who actually supplied her with the necessaries, to receive satisfaction against the husband, to the value of the articles proved to have been delivered to her (*d*).

Husband liable if he turn his wife out of doors, or oblige her to leave him.

4. And a fourth exception occurs when the husband, in breach of his duty, turns his wife out of doors, without provision, and without a sufficient cause; or when he, by cruel treatment (*e*), obliges her to leave

(*a*) 1 P. Will. 483. (*b*) Waithman v. Wakefield, 1 Campb. Rep. N. P. 120. (*c*) 1 Salk. 387. (*d*) Harris v. Lee, 1 P. Will. 483.

(*e*) See Harwood v. Heffer, 3 Taunt. 421. In this case it was held that the husband was not liable for necessaries supplied to his wife who had quitted him, in consequence of his having placed a

her home. In such cases, his liability to answer for her necessaries follows the wife; because the law will not allow her husband to divest himself of this duty to maintain her by such improper methods; it therefore continues his implied authority and consent, that she should make for him such contracts as are requisite for supplying her necessities (*a*).

5. We shall now consider the circumstances which will discharge the husband from his obligation to keep and maintain his wife. The husband will be exempt from this duty in all cases when the nature of the transaction is such as to preclude all possibility and even propriety to raise an implication that the wife acted under his authority.

Thus, if the wife leave her husband's house of her own accord, and without a sufficient provision, the law, for want of cohabitation (which is the foundation of his

But husband's liability ceases if wife leave him without sufficient reason,

profligate woman at the head of his table: it was considered necessary to show that she had been either driven from the house by actual violence or apprehensions for her personal safety. But in another case, Lord Ellenborough observed that the husband was bound to afford his wife means of support, if by the indecency of his conduct he precluded her from living with him, 2 Stark. 87. And in Aldis v. Clement, Selw. N. P. 281, he held that when a husband by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, he is bound to provide her with necessaries during the separation. In Horwood v. Heffer, the Lord Chief Justice remarked that if the rule were extended beyond the case of personal violence, it would be necessary for the jury to determine whether the wife lawfully left her home or not. But the determination of questions relative to the personal conduct of husband and wife by a jury, is the necessary consequence of the doctrine prevailing on this subject.

(*a*) 1 Salk. 118. 3 Wils. 389. Bolton v. Prentice, 2 Stra. 1214. Thompson v. Hervey, 4 Burr. 2177. 1 Esp. 441. 3 Esp. 250. 4 Esp. 41.

liability to support her), cannot continue the implied authority from him to her to purchase necessaries, which from her own act he was not bound to furnish (*a*).

which, according to some opinions, will revive if he refuse to receive her upon her offer to live with him.

Yet if, during her absence, she conduct herself with propriety, and offer and submit to return to her husband, and he refuse to receive her, then, according to the opinions of some persons, debts contracted by her from that period for necessaries will bind him; the implied authority for that purpose, which the law had suspended, being revived (*b*).

But *semble*, that husband's liability will not be revived before renewed cohabitation.

These opinions, however, may be doubted; for since the wife, by her own voluntary act, discharged her husband of his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable that his liability to support her afterwards should not be revived by implication without his express concurrence in consenting to his wife's return to his protection, or until their cohabitation was restored either by mutual agreement, or by the sentence of the Ecclesiastical Court.

When wife leaves her husband's house he ought to give notice to tradesmen.

But until it has become notorious that the wife has withdrawn herself from her husband's care and protection, his liability to engagements for necessaries will, as it seems, continue; so that he ought to give *particular* notices to tradesmen not to give her credit upon his responsibility. The propriety and necessity for such notices are apparent from the secrecy attending the wife's departure, and the improbability of her elopement being generally known until some time afterwards; but proof by the husband of the creditor's

(*a*) Etherington v. Parrot, 2 Ld. Raym. 1006. Longworthy v. Hockmore, cited 1 Ld. Raym. 444. 1 Sid. 130. 1 Keb. 430.
(*b*) 1 Sid. 129. 1 Keb. 365. Child v. Hardyman, 2 Stra. 875. 1 Mod. 131. 1 Lev. 4. 3 Esp. 251.

knowledge of the wife's departure and living separately from him, will protect him against the demand (*a*).

Elopement and adultery of wife a discharge to husband.

As the wife's departure from her husband without a sufficient reason exempts him from the duty of supporting her, it follows, that her elopement, accompanied with *adultery*, will discharge him from all obligation to find her necessaries, and consequently he will not be bound by her contracts for them (*b*); for, under such circumstances, it would be unreasonable to continue the implication of his authority to her to procure necessaries; and, in such an aggravated case, his refusal to take her again will not revive his obligation to maintain her (*c*).

And her adultery *after* being turned out of doors will discharge husband from her support from the time of her misconduct.

It may, however, happen that the wife, after being under the necessity of leaving her husband from his misconduct (in which case his liability to support her continues), may, by her own act, discharge him from his obligation to find her necessaries. This will occur if, after she has been turned out of doors by her husband without sufficient reason, she commit adultery.

Thus, in *Govier* v. *Hancock* (*d*), the demand was for the wife's board and lodging, and it appeared that her husband had *first* misconducted himself, and committed adultery with a woman whom he brought home, and that he afterwards ill-treated his wife and turned her out of doors. It was also in evidence that she, after being so expelled, committed adultery, and at last *offered* to return home; but her husband would not receive her. The Court was of opinion that the plaintiff could not recover his demand against the hus-

(*a*) 2 Ld. Raym. 1006. Todd v. Stokes, 12 Mod. 245. 1 Ld. Raym. S. C. 444. 1 Mod. 124. 1 Sid. 127, 8. 1 Bosanq. and Pull. 226. Hinton v. Hudson, Freem. Rep. 248. (*b*) Morris v. Martin, 1 Stra. 647. Manwaring v. Sands, 2 Stra. 707. (*c*) But if he voluntarily pardon her misconduct, and take her back, he becomes again liable. Harris v. Morris, 4 Esp. 41. (*d*) 6 Term Rep. 603. See 1 Bos. and Pull. 339.

band, and said, that although the precise case did not appear to have been before controverted, the probable reason was, that the point had not been doubted, and that it must be governed by the same principle upon which it had been determined that the husband was not liable in cases where his wife went away with an adulterer; that the rule was not modern, but was mentioned by *Lord Coke* in regard to dower (*a*); that the question was, whether the necessaries were provided *before* or *after* she had committed adultery? If *after*, the action could not be maintained, and that in the present case if the wife had instituted a suit in the Ecclesiastical Court against her husband for a restitution of conjugal rights, that Court would not have assisted her.

An exception to the rule that wife's adultery shall discharge her husband from supporting her.

But each case depends upon its own particular circumstances; and an instance may occur in which the adultery of the wife will not discharge her husband from his obligation to maintain her. Suppose, then, the wife to have committed adultery for some time in her husband's house, and unknown to him; but that so soon as he became acquainted with the circumstance, he, instead of turning her out of doors publicly, leaves his own house, and permits her to continue in possession of it with the adulterer; in such a case it is expedient for the safety of the public, and their dealings one with another, that the implied authority of the husband to his wife to purchase necessaries should not abruptly determine, so that in this instance, until their separation and her misconduct become notorious, her husband will be liable to the creditor for necessaries.

This point was determined in *Norton* v. *Fazan* (*b*). The plaintiff brought an action against the husband for necessaries sold to his wife and children, and it appeared that some time before the delivery of the goods,

(*a*) Co. Litt. 32. (*b*) 1 Bos. and Pull. 226.

the husband having discovered that his wife kept up an adulterous intercourse with another man, quitted her, leaving her in possession of his house, with two children bearing his name, and in which house the adultery was carried on. The wife was without a regular provision. The Court decided that the plaintiff was intitled to recover, because the wife was permitted to remain in her husband's house with her children, in which she had been placed by him, and was consequently enabled to procure goods upon his credit. But *Eyre*, C. J., said, that if the husband, in any other action, should be able to establish the *notoriety* of his wife's situation, he might defend himself; or that if he should be able to prove that the plaintiff in such action *knew*, or *ought* to have known the circumstances under which the wife was living, he might perhaps be able to prevent another verdict passing against him (*a*). *Buller*, J., made the following remark: "the wife committed adultery for a considerable time whilst she was living with her husband, and he voluntarily yielded his bed to the adulterer, and made no provision for her. What colour of defence is left? Knowing of her criminal conduct, and having made no provision for her, he *must* maintain her as before."

V. Suppose, then, the husband's obligation to support his wife to cease by her leaving his home, and that she is without any provision; it may be asked, who is to be answerable for her necessary debts and engagements? The argument in favour of her personal responsibility is, that when the husband ceases to be her protector, and is not liable to have any claim made upon him for her support and maintenance, it

When husband is discharged from his obligation to maintain his wife, yet she cannot contract so as to make herself *personally* liable,

(*a*) This seems to have proceeded upon the principle that as the wife continued in her husband's house, the plaintiff, if ignorant of the circumstances under which she was living, had no means of knowing that her authority to contract as her husband's agent was withdrawn.

follows of necessity that she must be her own protectress, make contracts for herself, and be responsible for them. Of this opinion, *Buller*, J., seems to have been in *Cox* v. *Kitchin* (*a*); but the Court did not decide upon the wife's personal responsibility merely as a consequence of separating herself from her husband, and living in adultery, but because she had, after leaving her husband, lived as, and represented herself to be, a single woman, and obtained credit in that character. This question, however, has been settled in the great case of *Marshal* v. *Rutton* (*b*). *Lord Kenyon*, in adverting to the above argument, urged in support of the wife's liability, observed, that it was not a necessary consequence of the determination of the husband's responsibility, that she should be at liberty to act as a *feme sole;* for if that were so, it would hold in all cases, but that the contrary was the truth; for if a woman eloped from her husband, withdrawing herself from his protection, and lived in adultery, he was not by law liable to answer for her necessaries, and no case had decided that she was so; and that any persons knowing her condition, if, instead of requiring *immediate* payment, gave credit to her, they had no greater reason to complain of not being able to sue her, than others who had nothing to confide in than the honour of those whom they trusted.

The case of *Marshal* v. *Rutton*, last referred to, is of so high authority, that it is considered as having overruled all prior decisions in contradiction to it. It restored the old established law founded generally upon the relation between husband and wife, by which, with certain known specific exceptions, no married woman was capable of contracting or acting as a *feme sole*, or of suing or being sued as such (*c*). Hence it follows,

(*a*) 1 Bos. and Pull. 339. (*b*) 8 Term Rep. 547.
(*c*) Hatchett v. Baddeley, 2 Black. Rep. 1079. Lean v. Schutz, 2 Black. Rep. 1195.

that if the wife be living apart from her husband in adultery (*a*), or otherwise, she is not personally liable for her engagements; and that upon the plea of coverture, in an action brought against her for that purpose, the Court will discharge her upon filing common bail, when she has been arrested as a *feme sole*, unless she have been guilty of *fraud* by holding herself out to the world as a single woman (*b*).

although she be living apart from him as an adulteress, &c.

And she will be discharged from arrest on filing common bail, if she have been guilty of no fraud or misrepresentation,

Thus, in *Waters* v. *Smith* (*c*), the Court said, that when a married woman imposed upon a trader and contracted on her own credit, it would not relieve her in a summary way (*d*); yet that, according to the last authority on the subject which the Master had furnished (where it had clearly appeared that the defendant was a married woman, and there had been no contradictory evidence about the fact), the Court had discharged her out of custody on filing common bail; that in the present case the fact was positively sworn to on one side, and not contradicted on the other. The rule for her discharge was therefore made absolute.

And, in *Wardell* v. *Gooch* (*e*), *Ellenborough*, C. J., made a similar rule absolute where the wife was living apart from her husband upon a separate maintenance, and the plaintiff, her creditor, who dealt with her, *knew* at that time that she was a married woman.

So also, in *Crookes* v. *Fry* and wife (*f*), the latter was arrested for a debt contracted by her whilst single. To justify the arrest it was sworn that the husband

and whether the debt be contracted before or after marriage.

(*a*) Gilchrist v. Brown, 4 Term Rep. 766. (*b*) Partridge v. Clarke, 5 Term Rep. 194. (*c*) 6 Term Rep. 451. Pearson v. Meadon, 2 Black. Rep. 903. (*d*) S. P. Luden v. Justice, 8 Moore, 346. 1 Bing. 344. *Contra*, Carlisle v. Starr, 9 Price, 161. See Harvey v. Cooke, 5 Barn. and Ald. 747. Hookham v. Chambers, 3 Brod. and Bing. 92. 16 Ves. 265. 1 Turn. Ch. Rep. 100. 3 Bos. and Pull. 128—220. (*e*) 7 East. 582. See also Pritchett v. Cross, 2 H. Blackst. Rep. 17. Pitt v. Thompson, 1 East, 16. (*f*) 1 Barn. and Ald. 165.

had absconded, and a case of *Robarts* v. *Mason* (*a*), was cited, to prove that the Court would not discharge a wife out of custody who had been arrested with her husband for a debt incurred *before* the marriage. But the Court said, it had been the constant practice where husband and wife had been arrested on mesne process, to discharge the wife, but that the husband could not be liberated without putting in bail for both. The wife was consequently discharged.

Previously to the solemn decision given by the twelve judges in *Marshal* v. *Rutton*, the determinations more immediately preceding it had deeply intrenched upon the common law; but that law being revived, as before stated, and those decisions (*b*) overruled, it is necessary to consider in what instances it permitted the wife, in exception to the general rule, to contract, to sue, and be impleaded as a single woman.

The earliest cases upon this subject proceeded upon the ground of the husband being considered as dead, and the widow as being in a state of widowhood, or upon the marriage contract being dissolved by a divorce *à vinculo matrimonii* (*c*).

Banishment of husband. Abjuration. Divorce *à vinculo*, &c. Transportation.

Accordingly, if the husband be banished from or abandon his country for life (*d*), or if the marriage be dissolved by act of parliament, in all such cases the wife's disabilities to contract, or to sue and be impleaded

(*a*) 1 Taunt. 254. (*b*) Ringstead v. Lady Lanesborough, and Barwell v. Brooks, Cooke's B. L. 28—31. Corbett v. Poelnitz, 1 Term Rep. 5. Derry v. Duchess of Mazarine, 1 Ld. Raym. 147. De Gaillon v. L'Aigle, 1 Bos. and Pull. 357. (*c*) A divorce *a mensâ et thoro* for adultery does not dissolve the relation of husband and wife; and therefore does not render the wife liable to be sued as a *feme sole*. Lewis v. Lee, 3 Barn. and Cress. 291. See Ellah v. Leigh, 5 T. R. 679. Hookham v. Chambers, 3 Brod. and Bing. 92. Fairthorne v. Blaquiere, 6 Maule and Sel. 73. (*d*) Belknap's case. Weyland's case, Co. Litt. 133. Wilmot's case, Moor's Rep. 851. Portland v. Prodgers, 2 Vern. 104. Newsome v. Bowyer, 3 P. Will. 37. Sparrow v. Caruthers, cited 2 Black. Rep. 1197.

as a single woman, are removed. The principle of these exceptions was afterwards extended to transportations for a certain number of years beyond which the husband's life might continue; for, during such exile, the wife being reduced to the same condition as she would have been if the sentence had consigned her husband to perpetual banishment, the Courts determined to impart to the wife the same powers and remedies, and to place her in the like situation as if the return of her husband had been from the first impracticable. During such period, therefore, the marriage contract is suspended, and the wife is to be considered as a single woman so as to be able to contract, to pay and receive money, to sue and be sued, and even liable to be taken in execution. And it would seem that when the husband's limited exile has expired, or if he be pardoned, the disabilities attending coverture will nevertheless continue suspended until his actual return (*a*).

It will appear from consideration of the above exceptions to the general rule of the common law, that they were founded upon the principle of the husband being under the necessity of absenting himself from this kingdom, and that his return to it was forbidden, and did not depend upon his own will and pleasure. When the principles laid down in *Marshal* v. *Rutton* are considered, and that the common law did not permit the husband and wife, by any agreement between themselves, to place her in the situation of a single woman as to the power of contracting, &c. it is presumed that (notwithstanding the contrary decisions before referred to (*b*), and some posterior (*c*) to *Marshal* v. *Rutton*), whether the husband be a native subject or a foreigner,

Semble, that the temporary absence of husband or any absence from this country, when he may return at option, will not intitle wife to sue, &c. as a *feme sole*.

(*a*) Carroll v. Blencow, 4 Esp. N. P. C. 27. But see Co. Litt. 133 *a*, and the observations of Lord Eldon in 2 Bos. and Pull. 231.
(*b*) *Ante*, page 120, note. (*c*) Walford v. Duchess of Pienne. Frank v. Duchess of Pienne, 2 Esp. N. P. C. 554, 587.

if he go abroad leaving his wife here, or being a foreigner, although he may never have been here (*a*), still as the husband's absence in either case depends upon his own will, his quitting or being out of the kingdom will not suspend the marriage contract, and place his wife in the situation of a *feme sole*, so as to restore the rights of disposition, personal liabilities, and powers which she parted with on entering into the marriage state (*b*). But when the husband is prevented from coming here, as in the instance of his being an *alien enemy*, then the principle of exception applies as in the examples before set forth.

The above observations appear to be supported by the two following cases determined subsequently to that of *Marshal* v. *Rutton*.

The first of those cases was *Marsh* v. *Hutchinson* (*c*). The demand was against the wife alone for coals supplied to her the last three or four years; and her defence was coverture. In 1783, her husband (who was an *Englishman*) left this country, and had occasionally been here since that period, but he having purchased the appointment of agent for the *English* packets at the *Brill*, in *Holland*, had for the last ten years resided there, and became possessed of lands in that country. In 1795 his agency ceased, in consequence of the irruption of the *French* into *Holland*, and he sent his wife and family to reside in this country, but he remained in *Holland* to look after his grounds, and with a view to the recovery of his situation if the intercourse between *England* and *Holland* should be re-established. His wife was considered a married woman in

(*a*) But in Kay v. Duchess of Pienne, 3 Campb. 123, Lord Ellenborough thought that if the husband was an alien, and had never been in this country, the wife might be sued as a *feme sole*. See 2 Bos. and Pull. 233. (*b*) Farrer v. Granard, 1 New Rep. 80. Kay v. the Duchess of Pienne, 3 Campb. 123. (*c*) 2 Bos. and Pull. 226. Chambers v. Donaldson, 9 East, 471.

the place where she lived, and her counsel insisted, that her husband being *domiciled* in a foreign country, from which he was not likely to return, his wife in this country must be treated as a single woman, and therefore capable of making contracts to *bind herself*. But the Court determined that the husband's residence in *Holland*, under the above circumstances, did not enable his wife, resident here, to bind herself by her own contract as a *feme sole*. And *Heath*, J., observed, that in the old cases of banishment and abjuration, as well as in the more modern ones of transportation, the husband *could not* return, as it would have been contrary to law; and that there was no case in which the wife had been held liable, her husband being an *Englishman*.

The second case was one where the action was brought by the wife as a *feme sole*; it was trespass (*a*), to which a plea of the plaintiff being a married woman was put in. It appeared that, in 1805, the husband went to *America*, leaving his wife destitute, and that the plaintiff ever since lived separate from him, and made contracts here, and obtained credit as a single woman; and that she, for her support, had, since the year 1805, carried on trade as a *feme sole*. The Court decided, that the plaintiff could not sustain the action.

Action by wife in name of husband.

[In cases where a married woman has caused an action to be commenced in the name of her husband, the Court has refused to stay the proceedings on the application of the defendant (*b*): and when the husband had by a separation deed agreed to give up the wife's property to her, and she afterwards brought an

(*a*) Boggett v. Frier, 11 East, 301. (*b*) Chambers v. Donaldson, 9 East, 471. Mingotti v. Drummond, 1 Hanmer, 469. A married woman, in the absence of her husband, will be allowed to sue alone in a testamentary cause in the Ecclesiastical Court, on finding security for costs. Suter v. Christie, 2 Addams, 150. See 10 Mod. 64.

action in their joint names for a debt due to her as executrix, a plea of a release given by the husband was set aside on motion (*a*).]

Exceptions to the disability of coverture by particular custom: of the city of London.

Another exception allowed to the wife's disability arising from coverture is founded upon particular custom, the same basis upon which the common law itself is grounded.

Accordingly, by the custom of the city of *London*, a married woman is enabled to carry on trade as a *feme sole* merchant. The custom, as translated from the *Liber albus* in the town-clerk's office, is as follows:

Feme, a sole trader within the city.

"Where a *feme*, covert of the husband, useth any craft in the said city on her *sole account*, whereof the husband meddleth nothing, *such a woman* shall be

The custom.

charged as a *feme sole* concerning *every thing that toucheth the craft;* and if the husband and wife be impleaded, in such case the wife shall *plead* as a *feme sole;* and if she be condemned she shall be *committed to prison* till she have made satisfaction, and the husband and his goods shall *not* in such case *be charged* nor impeached."

Construed strictly.

Upon this custom, which must be construed with strictness (*b*), the following observations occur.

The trade must be carried on in the city.

The trade must be carried on within the city, and on the wife's *sole* account; it seems, therefore, that if by any means it can be proved that her husband had any concern in it, the case will not be protected by the custom (*c*).

Husband's power in determining the trading,

The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect; neither can he do any act to injure her creditors, who are intitled to be satisfied out of her

(*a*) Innell v. Clement, 4 Barn. and Ald. 419. (*b*) 1 Roll. Abr. 567. 2 Leon. 109. (*c*) Langham v. Bewett, Cro. Car. 68. 3 Burr. 1782.

property in trade; but after those demands are satisfied, he may, as it would seem, by law possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce (*a*). Yet although he may do so at law by virtue of his legal right, still it may be a question whether a Court of Equity would not, as in the instances after mentioned, consider this surplus as the wife's *separate* property, she having procured it by her own industry, and with the permission of her husband, and without any risk incurred by him.

and his title to the wife's savings.

The proper tribunals for the wife to sue or be impleaded are in this instance those belonging to the city; and the superior Courts will not interfere with these jurisdictions, since the inferior Judges are best acquainted with the customs prevailing within those limits (*b*). But if the wife be sued in one of the Courts at Westminster, and the custom be pleaded, it will be there attended to and allowed (*c*). And when she sues or is impleaded either in the city Courts, or in those above, her husband must be joined for conformity (*d*); for a married woman cannot singly execute a warrant of attorney.

As to the wife, sole trader, suing or being impleaded.

Her husband must be a party.

As a necessary consequence of the wife's power to contract debts in her business, she is liable to a commission of bankruptcy; and this is for her advantage, for a different construction would subject her to perpetual imprisonment (*e*).

She is liable to the bankrupt laws,

In *Read* v. *Jewson* (*f*), the Court said that a married woman cannot execute a valid bond at law, because that would bind her heirs if she had real assets,

but cannot at law execute a valid bond, yet it will be supported in equity.

(*a*) Lavie v. Phillips, 3 Burr. 1782, 1785. (*b*) Cro. Car. 69. 3 Burr. 1782. Beard v. Webb, 2 Bos. and Pull. 97, in which case all the authorities are collected and commented upon by Lord Eldon. (*c*) 3 Burr. 1782. Ex parte Carrington, 1 Atk. 206. (*d*) Caudell v. Shaw, 4 Term Rep. 361. 2 Bos. and Pull. 98. 2 Wils. 3. (*e*) 3 Burr. 1783. (*f*) Cited 4 Term Rep. 362.

which no custom could warrant. It is, however, a good security in equity, as will appear when the wife's power to dispose of her property as a *feme sole* is afterwards considered. But at law this species of security by the wife has been determined to be void.

Accordingly, in the case of *Roberts* v. *Pierson* (*a*), the plaintiff, who was a married woman, entered into a bond for 100*l.*, as a security for the defendant. The defendant gave to her a bond and a warrant of attorney to confess a judgment as a counter security. The wife having been obliged to pay 50*l.* of the above sum for the defendant, entered up judgment upon the warrant of attorney, and took out execution; and upon an application to set aside the judgment, and for a restoration of the money paid by the defendant to the sheriff, the Court said, "A judgment at the suit of a *feme* covert is void, so is her *bond;* and the money which she paid for the defendant was her husband's, and he may sue for it, so the judgment must be set aside, and the money in the sheriff's hands restored."

Husband and wife, when to be joined as defendants in actions.

[In cases not within the exceptions detailed above, the wife can only be sued at law jointly with her husband.

Where the cause of action is founded upon a contract by the wife *dum sola*, as a debt contracted by her before marriage, the action must be brought against the husband and wife jointly (*b*). But in an action founded on a contract subsequent to the marriage, the wife cannot be joined as a defendant (*c*), the contract being void as against her; and for the same reason if the contract was previous to the marriage, a subsequent promise by the wife cannot be alleged (*d*).

(*a*) 2 Wils. 3. See 6 Mau. and Sel. 73. (*b*) Mitcheson v. Hewson, 7 T. R. 348. Richardson v. Hull, 1 Brod. and Bing. 50. (*c*) See 4 Vin. Ab. 93, pl. 5. (*d*) Morris v. Norfolk, 1 Taunt. 312. See Pittam v. Foster, 1 Barn. and Cress. 248.

Where the cause of action is founded on a tort committed by the wife before marriage, as in trover, the husband and wife must be joined as defendants (*a*). Where the cause of action arises from a tort by the wife alone during the marriage, as in an action for slander by her (*b*), or where it arises from a tort committed by the husband and wife together, the action lies against both (*c*). In an action of trover against them, the conversion, if subsequent to the marriage, should be stated to be to the use of the husband alone, as the wife cannot acquire property by it (*d*): but after verdict a declaration stating the conversion to be to the use of the husband and wife has been held good, as the conversion might have been by destruction, and consequently without the acquisition of property (*e*). But in some cases a tort by husband and wife may be considered in law as the act of the former, and the action may be brought against him alone: thus trover lies against the husband alone on a conversion by both (*f*).

Where the husband is sued jointly with his wife, an appearance should be entered by him for both; but where he appeared for himself alone it was held that this appearance could not be treated as a nullity (*g*); but the plaintiff has been permitted, after having served the wife, to enter an appearance for her under the statute (12 Geo. I, c. 29), and to sign judgment for want of a plea (*h*).

Where the wife being sued alone pleaded coverture, and a verdict was found for her on this plea, it was

(*a*) 2 Saund. 47, *l.* note. (*b*) Swithin v. Vincent, 2 Wils. 227. (*c*) Com. Dig. Bar. and Feme. Y. (*d*) 2 Saund. 47, *l.* note. Cro. Car. 254. (*e*) Keyworth v. Hill, 3 Barn. and Ald. 685. (*f*) 2 Saund. 47, *l.* note. See Chitty on Pleading, vol. I, p. 82. (*g*) Clarke v. Norris, 1 Hen. Bl. 235. (*h*) Russell v. Buchanan, 6 Price, 139.

held that the process for the costs must be issued in her name alone (*a*).

Marriage pending action.

If a woman marries during the pendency of an action brought by her, the coverture may be pleaded in abatement, as a plea *puis darrein* continuance (*b*). If it be not thus pleaded, the action proceeds as if she were still a *feme sole* (*c*).

It is said that if a *feme* defendant marries after the commencement of the action, her coverture cannot be pleaded in abatement (*d*), nor can she bring a writ of error on this ground (*e*). But where a *feme sole* was sued in an inferior Court, and removed the cause to the King's Bench by habeas corpus, and there pleaded that she was covert at the time of suing out the habeas corpus (*f*), this plea was held good: in another case a similar plea was set aside on motion (*g*).

Arrest on mesne process in actions against husband and wife.

In actions against the husband and wife for debts incurred by her before the marriage, if she be arrested in mesne process without her husband she will be discharged on filing common bail (*h*); and the practice of the Court of King's Bench is the same where she is arrested with the husband (*i*); but in the latter case the Court of Common Pleas has sometimes refused to discharge her (*k*). But the husband if arrested is not discharged without putting in special bail for both (*l*). And where the husband was an attorney, it was held that he was not privileged from arrest in this action (*m*).

(*a*) Wortley v. Rayner, Dougl. 637. (*b*) Bull. N. P. 309. (*c*) Morgan v. Painter, 6 T. R. 265. (*d*) Chitty on Pleading, vol. I. p. 438. (*e*) King v. Jones, 2 Ld. Raym. 1525, 1 Str. 811. (*f*) Hetherington v. Reynolds, 1 Salk. 8. 11 Mod. 142. (*g*) Haddock v. Howard, Barnes. 355. (*h*) Edwards v. Rourke, 1 T. R. 486. Cookes v. Fry, 1 Barn. and Ald. 165. See 1 Taunt. 255. (*i*) Cookes v. Fry, *ub. supra*. 6 Mod. 17. 2 Strange, 1272. (*k*) Roberts v. Mason, 1 Taunt. 254. See 5 Barn. and Ald. 759. *Contra*, Anon. 3 Wils. 124. (*l*) Roberts v. Mason. (*m*) Ibid.

Where a judgment is obtained against the husband and wife, the writ of *capias ad satisfaciendum* may be issued against both, and the Courts have in several cases refused to discharge the wife, unless it appeared that she was arrested by collusion between the plaintiff and her husband (*a*), or that she was improperly joined in the action (*b*). But it seems to be understood to be at present the practice, at least in the Court of King's Bench, to discharge the wife in all cases, when taken in execution, as well as when taken on mesne process (*c*).

Arrest in execution under judgment against husband and wife.

A married woman in custody for debt could not be discharged under the acts for the relief of Insolvent Debtors which were in force previously to the statute 3 Geo. 4, chap. 125, those acts having required that the insolvent should before the discharge execute a warrant of attorney and a conveyance, terms which could not be complied with by a married woman (*d*). But by the statute 3 Geo. 4. chap. 123, sec. 12, the provisions of the Insolvent Debtor's Acts are extended to married women. It is required that the woman, on petitioning to be discharged, shall convey and assign to the assignee all property real and personal, to which she may be intitled for her separate use, or over which she may have any power of disposition notwithstanding her coverture, or which may be vested in trustees for her benefit; to deliver up all effects in her actual possession, and also all other real and personal estate and effects to which she may be intitled in any manner in possession, remainder, or reversion: these acts she is empowered to do alone, and the property is thereby vested in the assignee in the same manner as if she

Feme covert may take the benefit of the Insolvent Act.

(*a*) See Anon. 3 Wils. 124. Berriman v. Gilbert, Barnes. 203. Pitts v. Miller, 2 Stra. 1167. Finch v. Duddin, Ibid. 1237, 2. W. Bl. 720. (*b*) Rownson v. Williamson, Barnes. 207.
(*c*) Tidd's Practice, 7th Edition, vol. I. p. 220; vol. II. p. 1043.
(*d*) Ex parte Deacon, 5 Barn. and Ald. 759.

were a *feme sole*, subject only and without prejudice to the rights of her husband: she is also to execute a warrant of attorney, under which a judgment may be entered up against her for the amount of her debts: the judgment thus entered up is not to prejudice the rights of her husband, except that the same is to be taken to be her debt in case she shall die in his lifetime, to the end that it may be discharged out of her personal assets in a course of administration or out of her real estate, but without prejudice to the husband's right as tenant by the curtesy: in case of her becoming, during the coverture, intitled to any property for her separate use, the judgment may be enforced against such separate property by suit in equity or otherwise, for the purpose of obtaining payment of the debts from which she was discharged: in case of her surviving her husband, the judgment may be enforced against her or her property in the same manner as if she had been a *feme sole* at the time of executing the warrant of attorney. Her discharge is not to operate to release the husband from the debts.

Since this statute, there will not be the same necessity for the summary interference of the Courts to discharge married women when arrested, and it may perhaps have some influence upon the practice on that point.]

CHAPTER XVII.

OF GIFTS AND ALLOWANCES BY HUSBAND TO WIFE.

THE exceptions which by the common law and particular customs were allowed to the general disabilities of coverture having been treated of in the last chapter, we shall next proceed to the consideration of other exceptions to them, and the consequences and effects of such exceptions upon the relation between husband and wife, under the above title: the subjects of which will be treated of under the following heads:—

I. *The pin-money of the wife.*
II. *Gifts or allowances to her to keep house, &c.; and*
III. *Her paraphernalia.*

In the beginning of the first volume it was observed that, by policy of law, the husband and wife are considered as one person, and that upon this union depend almost all the legal rights and disabilities which either of them acquired or suffered during the marriage. In consequence of this unity of persons, although immediate gifts of property by the husband to his wife are void at law (*a*), yet they will be supported in equity (*b*), when the transactions are *bonâ fide*, and

Gifts between husband and wife supported in equity.

(*a*) See vol. I. p. 53. (*b*) 1 Atk. 271. In general, however, voluntary instruments, if incomplete, are not aided in equity. Ellison v. Ellison, 6 Ves. 656. Antrobus v. Smith, 12 Ves. 39. Pulvertoft v. Pulvertoft, 18 Ves. 84. Sutton v. Chetwynd, 3 Mer. 249.

not intended as covers for fraud, nor are such unreasonable acts as to prevent that Court's interference; one of which occurred in the case of *Beard* v. *Beard* (*a*), where by a deed-poll the husband gave and granted to his wife *all* the property which he then had, or might afterwards have. *Lord Hardwicke* said that such a grant or gift could not take effect, because the law would not permit a man to make a grant or conveyance to his wife during his life, and that the Court would not allow the wife to have the *whole* of her husband's estate whilst he lived, for that was not in the nature of a provision, which was all that she was intitled to.

Pin-money.

I. But gifts by the husband to his wife for clothes, or to purchase ornaments, or for her separate expenditure, will be good in equity. Such gifts are known by the name of *pin-money*, and may be either a yearly allowance settled upon the wife before marriage, or gratuitous gifts or payments from time to time by him to her afterwards. When such a settlement is made previously to the marriage, it will not only be binding upon the husband, but also upon his creditors, which has been shown in the first volume (*b*).

The following propositions appear to be authorised by the cases upon this subject.

Presumptive bar to arrears.

When the wife permits her pin-money to run in arrear for a considerable time, and she is during the whole period supported by her husband, it will be presumed that, in consideration of such support, she waived her claim to pin-money; and upon surviving her husband she will only be permitted to claim arrears for one year prior to his death (*c*).

When such presumption repelled or prevented

But this is a *presumption* only, and may be repelled.

(*a*) 3 Atk. 72. (*b*) Chap. 8, p. 299, *et seq.* For the form of such a settlement see Append. No. 9. (*c*) 2 Ves. sen. 190, 267. Offley v. Offley, Pre. Ch. 26.

If, therefore, it appear that the wife demanded her pin-money without success, or if she lived separate from her husband, and without any allowance (*a*), she will be intitled to all arrears due at her husband's death; for against express demands for payment, or where there is neither cohabitation nor maintenance of the wife by her husband, a presumption cannot be raised that she intended to give up her claim to pin-money, so that she will be intitled to all arrears up to her husband's death (*b*).

Nor can such presumption arise when the wife is *non sanæ memoriæ*, and therefore incapable of consenting or waiving her right (*c*).

What a satisfaction.

But if the provision be expressed to be made for particular purposes, as for the wife's apparel or private expenses, and they are provided for by the husband; this circumstance will bar the wife from claiming any arrears of her pin-money, which otherwise might be due at the decease of her husband; for this will be considered a payment or satisfaction by the husband (*d*).

Thus in *Powell* v. *Hankey* (*e*), *Lord Macclesfield* said that if there be a provision for the wife's separate use for clothes, and her husband provide them for her, her claim to the provision will be barred.

So also in *Thomas* v. *Bennett* (*f*), pin-money was secured to the wife by settlement before marriage, for her apparel and private expenses: the wife survived her husband and died; then her executors claimed 500*l.* for *ten* years' arrears of the provision, but it appearing that the husband maintained her, and there being no evidence that she had ever demanded the pin-money, the claim was disallowed. Again,

In *Fowler* v. *Fowler* (*g*), *Lord Talbot* said that

(*a*) 1 Ves. sen. 267. (*b*) Ridout v. Lewis, 1 Atk. 269. (*c*) Brodie v. Barry, 2 Ves. and Bea. 39. (*d*) 3 P. Will. 355. (*e*) 2 P. Will. 84. (*f*) 2 P. Will. 341. (*g*) 3 P. Will. 355.

where pin-money was secured to the wife, and it appeared that the husband, nevertheless, provided her with clothes and other necessaries, that circumstance, during the time that she was so provided for, would be a bar to any demand for arrears of pin-money.

A legacy.

The last case was one upon the doctrine of the satisfaction of a debt by a legacy. The husband, in consideration of the then intended marriage, and of the wife's portion, settled 100*l.* a year upon her for pin-money. Two years' arrears became due, and then the husband gave her a legacy of 500*l.* After the making of the will another year's arrears became due, and then he died. And *Lord Talbot* decided, that the legacy of 500*l.* was a satisfaction of the two years' arrears, because of larger amount than the debt, upon the general rule which is established in such cases; and that the creditor and legatee being a wife made no difference. But his Lordship held that the bequest could not be a satisfaction of the one year's arrears, since that was a debt not contracted at the date of the will, and might possibly have never become due (*a*).

Semble, that elopement or adultery of wife is no bar to her enforcing payment of her pin-money or other separate estate,

In former passages of this work the consequences of the wife abandoning her home, and also of her living in adultery, have been considered (*b*); and it is presumed that this proposition may be deduced from the majority of the cases, that when the wife unnecessarily elopes from her husband, and does or does not live in adultery, if she apply to a Court of Equity for a *favour* (and *not* for a *right*), as for a maintenance out of her equitable property, the interest of which her husband is intitled to receive, the Court will not interfere in her behalf. But if she apply to its jurisdiction for the re-

(*a*) For the distinctions which have been established as to when a legacy shall and shall not be a satisfaction of a debt, see "Treat. upon Legacies," vol. II. chap. 13, p. 1, &c. 2 *ed.* (*b*) Vol. I. p. 275, 523, 559. See also Buchanan v. Buchanan, 1 Ball. and B. 203.

covery or enforcing of her *rights*, as for the performance of articles before the marriage for a settlement to her separate use; there the Court must interfere, since the law has not made elopement or adultery a forfeiture of any such interests, but of dower only.

and that a Court of Equity will not enjoin her trustees proceeding at law to recover her pin-money.

Upon this principle, therefore, notwithstanding the loose note of the case of *More* v. *The Earl of Scarborough*, to be found in Equity Cases abridged (*a*), and the *obiter dictum* of *Lord Hardwicke*, in *More* v. *Moore*, after mentioned, it is presumed that a Court of Equity cannot, at the suit of the husband, enjoin the trustees of an adulteress from proceeding at law to compel payment of her pin-money, except upon paying up the arrears; nor refuse to interfere on her part to compel the execution of a settlement in pursuance of articles entered into previously to the marriage. In *Lee* v. *Lee*, shortly reported in *Dickens* (*b*), the Chancellor refused *in limine* to restrain the husband from receiving the rents of estates which before the marriage had been settled to the wife's separate use; the reason given by his Lordship for the refusal was, that the wife having left her husband without a cause, and refusing to return, the motion, if granted, might altogether prevent their future cohabitation. The refusal, therefore, was not a decision of the question in the cause, but it was made under certain circumstances, and with a particular view, viz. to cause a reconciliation between man and wife; and the case of *Moore* v. *Moore* (*c*), referred to in it, is one of quite a contrary effect. There 100*l.* a year pin-money were, before marriage, secured by a term for years in trustees for the wife's separate use. After twenty years' cohabitation in harmony, they quarrelled, and she left him, and went abroad. Her trustees brought an ejectment for recovering possession of the term, the annuity being in

Cases considered.

(*a*) 2 vol. 156, pl. 7. (*b*) Pages 321, 806. (*c*) 1 Atk. 276.

arrear. To stay these proceedings, the husband filed a bill complaining of his wife's elopement, offering to take her back again, and to forgive what was passed; but *Lord Hardwicke*, after observing that possibly the agreement before marriage might have been designed to provide for the wife if the parties should disagree, and that the husband had made payments of the annuity since the wife's elopement (a strong presumption that he thought at least her separation was excusable), ordered the arrears of the pin-money to be paid, with costs; and, upon payment and keeping down the growing payments of the annuity, his Lordship continued the injunction which had been obtained by the husband (*a*).

The right of the wife to call upon a Court of Equity to enforce her equitable interests, although she may have left her husband, and also have added to that impropriety the crime of adultery, appears to be established by the two following cases.

In *Sidney* v. *Sidney* (*b*), the wife by her bill prayed the specific performance by the husband of his agreements in articles made before marriage, in which he covenanted to convey estates to the use of himself and wife for their lives in succession, &c. and she, a minor with consent of guardians, covenanted to settle her estates as therein mentioned. The husband stated in his answer, that *his wife had withdrawn herself from him, and very much misbehaved herself.* There was strong evidence of her criminal conversation with another man, and there was also some proof of the husband's adultery; yet the wife obtained a decree for a specific performance at the *Rolls*, from which the husband appealed to *Lord Talbot*, who confirmed the decree, observing that the answer did not sufficiently put the

(*a*) On this subject see also chap. 20, sec 2. (*b*) 3 P. Will. 269.

fact of adultery in issue (*a*), and he, therefore, could not decide upon it; that articles for a jointure were considered in equity as an actual and vested jointure, and that it was not forfeited either by the wife's elopement or adultery, and that the reason why she loses her dower by committing adultery, is from the effect of the statute of Westminster the second (*b*).

The second case is *Blount* v. *Winter* (*c*). There were two bills filed, the one by trustees in marriage articles, and the children of the marriage against husband and wife; and the other by the husband against his wife and children. The first bill prayed a performance of the articles; and the husband by his answer, and also by his own bill, resisted the performance, so far as the articles made a provision for his wife, alleging and *proving* that she lived separate from him *in adultery*. The Court was of opinion that this was no reason for a non-performance of the articles as to the wife, and decreed accordingly in the first cause, and dismissed the husband's bill, but without costs.

Upon the whole it is presumed, upon these authorities, that the wife's elopement only, or her elopement and adultery, do not deprive her of the power of enforcing any of her legal (*d*) or equitable rights, with the exception of her right to dower.

Allowance to wife to keep house, &c.

II. There is a species of allowance to the wife by the husband, which may be classed under the head of pin-money. It is where he permits his wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries, or where he makes to her a yearly allowance for the keeping of his house. The profits in the first case,

(*a*) 1 Atk. 276. (*b*) Chap. 24. (*c*) Stated in a note, 3 P. Will. 277. S. P. Seagrave v. Seagrave, 13 Ves. 444.

(*d*) Field v. Serres, 1 New Rep. 121.

Savings are her own separate property.

and the savings in the other, will in equity be considered as the wife's own separate estate, although at law they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband.

In *Sir Paul Neal*'s case (*a*) it was decreed, that if a woman have pin-money or a separate maintenance settled upon her, and by management or good housewifery she save money out of it, she may dispose of the savings, or any jewels, &c. bought with them, by writing in nature of a will, if she die before her husband; or if she be the survivor, then it was said that the money shall be her own, and not be liable to her husband's debts. But this exemption from debts must mean, as it is presumed, when such provisions are made, or agreed to be so, before and in contemplation of marriage, for in that case the wife is a purchaser of them for a valuable consideration; but when they are made during the marriage, they being void in law, and enforced only in equity, that Court will not proceed to the extent of taking from the creditors a fund which is legal assets of the husband to satisfy their debts (*b*).

Their and pin-money's liability to husband's debts.

A leading case upon this subject is *Slanning* v. *Style* (*c*). It appeared that the husband allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters, which arose from his farm, and beyond what was used in the family, for her own separate use; and which allowance he called her pin-money. From her death, until he married the defendant *Style*, his sister kept his house, and had the same allowance, which was continued to the defendant, the second wife, as pin-money. It was in *proof*, that whenever any person came to

(*a*) Cited in Herbert v. Herbert, Pre. Ch. 44. (*b*) Pre. Ch. 297. (*c*) 3 P. Will. 337.

buy any fowls, pigs, &c. the husband said he had nothing to do with those things, which were his wife's; and it further appeared in evidence, that he confessed that he, having been making a purchase of about 1000*l.* value, and being in want of money, had been obliged to borrow 100*l.* from his wife to make up the purchase-money. The husband being dead, his widow claimed the 100*l.* out of his estate. And *Lord Talbot* decreed that she should be a creditor for such sum, observing, that the money being the wife's savings, and the husband's agreement having been proved, it was but a reasonable encouragement to her frugality, and that such agreement would be of little avail, if it were to determine with his death; that it was the strongest *proof* of the husband's consent, that the wife should have a separate property in the money arising by the savings, in that he had applied to and prevailed with her to lend him the 100*l.*; for he did not claim it as his own, but submitted to borrow it as her money. Therefore, and especially as there was *no creditor* of the husband to contend with, his Lordship decreed as above.

In *Calmady* v. *Calmady*, referred to in the last case, the husband agreed with his wife, that upon every renewal of a lease by him she should receive from the tenant two guineas, and that sum was allowed to be her separate money.

So, also, in *Mangey* v. *Hungerford* (*a*), the wife, as it appeared, had saved a considerable sum of money out of house-keeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by *answer* that she was not bound to make such a discovery; and upon exceptions to the answer it was held sufficient by *Lord King*.

These savings being to be considered the separate

(*a*) 2 Eq. Ca. Abr. 156 in marg.

property of the wife, she may either dispose of them by will as a *feme sole* or by act in her lifetime (*a*).

With respect to the general power of the wife to dispose of the savings arising from her separate property, the principle is laid down by the *Lord Keeper* in the case of *Gore* v. *Knight* (*b*) to the following effect: that the wife having a power to dispose of the principal, she necessarily has the like power over its produce, for the *sprout* is to savour of the *root*, and to go the same way.

The last subject proposed to be considered was,—

Paraphernalia.

III. The wife's paraphernalia.

The term paraphernalia is of Greek derivation, παραφερνη, i. e. somewhat to which the wife is intitled over and above dower; and according to the civil law, "Bona Parapherna sunt quæ mulier ultra dotem adfert, et de his bonis maritus administrationem habet, ita ut sine speciali uxoris mandato et agere et convenire possit (*c*)."

The articles comprised under this term include such

(*a*) Sir Paul Neal's case, stated *supra*, p. 138. But these cases, in which the wife has been considered to have a separate property in her savings out of a voluntary allowance from her husband, are shaken by later authorities, which have laid down the principle, that the wife cannot acquire separate property from her husband, except by a clear irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his, by which he divests himself of the property, engaging to hold it as a trustee for the separate use of his wife. 5 Ves. 79. See Walter v. Hodge, 2 Swan, 92. In Tyrrell's case, 1 Freem. 304, where the question was as to the wife's right to jewels, stated to have been bought out of a yearly sum allowed by her husband for her expenses during cohabitation; the Lord Keeper thought that would make no difference, that if the wife saved any thing out of such allowance, it belonged to the husband. See also chap. 18. sec. 4, post.

(*b*) 2 Vern. 535. See also 1 Vern. 244. Gold v. Rutland, 1 Eq. Ca. Abr. 346, pl. 18. Fettiplace v. Gorges, 1 Ves. jun. 46. 3 Bro. C. C. 8, and Cecil v. Juxon, 1 Atk. 278, stated *infra*.

(*c*) Minsing on the Institutes, p. 97.

apparel and ornaments of the wife as are suitable to her condition in life (*a*). What are to be so considered, are questions to be decided by the Court, and will depend upon the rank and fortunes of the parties (*b*).

Pearls and jewels, usually or sometimes worn by the wife, properly fall within this term (*c*). And in *Mangey* v. *Hungerford* (*d*), the widow claimed her gold watch and several gold rings as paraphernalia, which had been given to her at the funerals of relations, and they were decreed to her by *Lord Talbot.*

What gifts by the husband so considered.

When gifts are made by husbands to their wives of pearls, jewels, &c. and they are worn as ornaments, the articles so given are to be considered merely as paraphernalia, and not as gifts to the separate uses of the wives; for if they were adjudged as donations to the separate uses of the wives, then they might dispose of them, which would be contrary to the intentions of the donors. And although the trinkets be not usually, but only sometimes worn by the wives, such occasional use of them will be sufficient to class them under the term paraphernalia (*e*).

The power over them of husband and wife singly.

Of such presents, or of her other paraphernalia, a wife cannot dispose by gift or will during her husband's life. Nor can he dispose of them by will during her life, although he may sell or give them away (*f*); and with this and the cases in equity agree the opinions of *Berkeley* and *Jones*, Justices, in *Hastings* v. *Douglas* (*g*). If, then, the husband bequeath all his wife's jewels, &c. to some of which she is intitled as paraphernalia, the disposition will be disappointed so far only as regards the latter jewels. And when such

(*a*) 2 Black. Com. 436. (*b*) Bindon's case, Moor, 213. See also 2 Leon. 166. Cro. Car. 343. 1 Roll Abr. 911. Pre. Ch. 27. (*c*) 1 Roll. Abr. 911. (*d*) 2 Eq. Ca. Abr. 156 in marg. (*e*) Graham v. Londonderry, 3 Atk. 394. (*f*) 1 P. Will. 730. Wilcox v. Gore, 11 Vin. Abr. 180, pl. 19. 2 Atk. 78. Seymore v. Tresilian, 3 Atk. 358, 369. (*g*) Cro. Car. 344.

a general disposition is made, the only difficulty is to ascertain what shall be considered paraphernalia and what not.

In *Calmady* v. *Calmady* (*a*), *A* having a crocheat of diamonds which belonged to his first wife, devised it to his eldest son, and that it should go in succession to the heir of his family as an heir-loom. *A* afterwards married the defendant *C*, turned the crocheat into a necklace, and *added several new diamonds* to it, at the expense of 200*l.*, which exceeded the value of the crocheat. *B*, the then eldest son of *A*, claimed the crocheat from *C* under the will, who insisted upon retaining it as part of her paraphernalia, *A* having permitted her to wear it. And *Parker*, C., seemed to doubt at first, whether turning the crocheat into a necklace, adding new diamonds to it, and permitting the wife to wear it, were not a revocation of the bequest; but he ordered the Master to examine and separate the *old* from the *new* diamonds, and decreed the diamonds of the crocheat to the plaintiff as heir, and specifically devised to him as an heir-loom. Although no mention is made in the report of the *new* diamonds, yet it is inferred from the separation, that they must have been ordered to the widow as part of her paraphernalia.

Liable to husband's debts,

2. As the husband may dispose of his wife's paraphernalia in his lifetime, so they will be liable to his debts (*b*).

In *Ridout* v. the *Earl of Plymouth* (*c*), the question was, whether jewels, rings, pictures, dressing plate, and other trinkets given to *Mrs. Lewis before* her marriage, belonged to her as her *separate* estate, and the husband was to be considered a trustee for her; and whether, as to things given *after* the marriage,

(*a*) 11 Vin. Abr. 181, 21. (*b*) 17 Ves. 273. 2 Ves. sen. 7.
(*c*) 2 Atk. 104.

viz. mourning rings, family pictures, &c. they should not be retained by the widow, as of too trifling a value to be considered her husband's personal estate? And *Lord Hardwicke* decided that the widow could not claim the articles as paraphernalia, when her husband's assets were insufficient to pay his debts; also, that he could not be considered in the light of a trustee of the jewels, &c. given to her *before* marriage, since that would be a manifest prejudice and fraud upon his creditors; and that there was no pretence for considering the things given *after* the marriage as the property of the widow; but his Lordship allowed her to be a purchaser at the value set upon them by the Master, none of the parties opposing it.

except perhaps when the articles are given by a stranger.

It is presumed that the question in the last case was decided upon gifts made *by* the husband of articles forming parts of his own estate; for it seems that when they are made to a wife either before or after marriage by a relative, or friend, they will be considered as intended for, and gifts to the *separate use* of the wife, and that therefore she may dispose of them as a feme sole, and that they will be exempt from the alienation and debts of her husband.

Thus in *Graham* v. *Londonderry* (*a*), the husband's father, upon the wife's marriage with his son, gave her as a present some diamonds. And *Lord Hardwicke* said that the Court of late had considered such a present as a gift to the *separate* use of the wife, and that he was of opinion that she was intitled to the diamonds in her *own right.* In that case there were four diamonds set about the picture of the then late Regent of *France,* which picture, upon the husband's return from France, he delivered to his wife, and told her that it was a *present* sent to her *by* the Regent. As to this *Lord Hardwicke* observed, that if it were such

(*a*) 3 Atk. 393.

a present, it was within the above rules, for then it being a present *by a stranger* during the marriage must be considered as a gift to the wife's *separate* use, although his Lordship did not consider the case so clear as the other. In support of his opinion, *Lord Hardwicke* referred to several cases, two of which were in his own time; the first was *Lucas* v. *Lucas* (*a*), in which were two questions, one in respect of 1000*l.* *South Sea* annuities which the husband had transferred into his wife's name, and the other as to jewels, &c. given *by* the wife's *father* to her; and his Lordship was of opinion that she was intitled to both as gifts to her *separate* use. The second case was *Brinkman* v. *Brinkman;* there articles of plate were given to the wife after marriage by the husband's *father*, and *Lord Hardwicke* was of opinion that they were to be considered as gifts for her *separate* use (*b*).

The interest of the wife in her paraphernalia is so much favoured in equity, that if the husband die indebted, and her *paraphernalia* are taken by his specialty creditors in satisfaction of their demands after all the general personal estate is exhausted, she will be allowed to stand in the places of such creditors, to reimburse herself out of the real estate in the possession of the *heir* the amount of her paraphernalia, and she is intitled to a precedency in payment to legatees (*c*).

Wife's paraphernalia are preferred to legacies.

3. With respect to the equity of marshalling the assets in favour of the wife, the same rule applies as in marshalling for simple contract creditors and legatees, which is, that when a creditor, as by specialty, has the option of resorting to both the real and personal assets for a satisfaction of his debt, and simple contract creditors or legatees have the power only of resorting to

Assets marshalled in favour of widow's right to paraphernalia.

(*a*) 1 Atk. 270. (*b*) See Dutton v. Dutton, 4 Ven. Ab. 178, pl. 18. (*c*) Snelson v. Corbett, 3 Atk. 370. Tipping v. Tipping, 1 P. Will. 722. Aldrich v. Cooper, 8 Ves. 397.

the latter fund for payment of their demands, if there be a deficiency of the personal estate to pay both of them, the Court will so marshal or arrange the different estates as to confine the specialty creditor to the real fund if sufficient, for a satisfaction of his debt, in order that the personal estate may be left free to answer the demands of the simple contract creditors or legatees; or in case the specialty creditor shall have received payment of his debt out of the personal assets, then the Court, upon proper application, will permit the simple contract creditors or legatees to receive satisfaction out of the real estate to the amount of what such specialty creditor was paid out of the personal fund. But in order to enable the Court to extend to simple contract creditors or legatees these advantages, the real estate must be *charged* with the payment of debts, or of one or more legacies, or when there is no such charge the specialty creditor must have a *lien* upon the estate, *except* when the owner of it is *heir* at law, and then as against him the simple contract creditors or legatees will be permitted to throw the general bond debts upon the lands, in exoneration of the personal estate. But against a *devisee* of the estate it seems that there must be some such *lien* as before-mentioned, as by virtue of a mortgage, &c. (*a*).

As against the heir.

Or devisee.

(*a*) The authorities agree that in the administration of assets, the widow's claim to her paraphernalia is preferred to general legacies (1 P. W. 730. 3 Atk. 369, 395.); and it follows that she is intitled to marshal assets in those cases in which a general legatee would have that right. Thus she may marshal assets as against the heir (Tipping v. Tipping, 1 P. W. 729. Probert v. Clifford, 1 Atk. 440. Ambl. 6. 2 P. W. 544, note by Cox), and as against a devisee when the devised estate is by the will subjected to a trust or charge for payment of debts (Incledon v. Northcote, 3 Atk. 430. Boynton v. Parkhurst, 1 Bro. C. C. 576. 1 Cox, 106. See 2 Atk. 79). The case of Probert v. Clifford, is indeed, according to the report in Ambler, inconsistent with the last position: it is there stated to have been held that the widow was not intitled to satis-

Accordingly in *Tynt* v. *Tynt* (*a*), the husband died indebted by *recognizance*, and devised his real estates.

faction out of the real assets devised, though charged by the husband's will with the payment of debts: it appears, however, from the Register's Book (B. 1738, fo. 310), that the husband's real estate was by the will charged only with a sum of 1000*l.* in favour of the wife, and with his legacies in case of a deficiency of the personal estate, and not with debts; and the form of the decree shows that the real estate was only considered liable on the ground of there being specialty debts.

The widow's claim to paraphernalia being preferred to general legacies, it seems that if the devised estate be subject to a mortgage or other specific incumbrance, she would be intitled to marshal the assets as against the devisee, by throwing the charge upon the estate, since a legatee would in such cases have that right. Oneale v. Mead, 1 P. W. 693. Lutkins v. Leigh, Cas. Temp. Talb. 53. See 2 P. W. 335.

But if the devised estate be not subject to a charge, the widow, according to Lord Hardwicke's decisions in Ridout v. Plymouth, 2 Atk. 104, and Probert v. Clifford, *ub. sup.*, is not intitled to marshal assets against the devisee. The case of Tynt v. Tynt, seems not quite consistent with these decisions: the widow was allowed to come upon the real estate devised, though not charged with debts, and not subject to any specific incumbrance. But it is to be observed that in that case there was a general devise of all the real estate, and the Court stated as the reason for the decision that the devisee was *hæres factus*, and stood in the place of the heir: it was considered that in the administration of assets, a general devisee could not stand in a better situation than the heir, an opinion which for some time prevailed (see Cas. Temp. Talb. 54. Ambl. 129. 1 Dick. 105); but which has since been overruled. Forrester v. Leigh. Ambl. 171.

As to specific legatees, it seems to have been considered in Burton v. Pierpoint, 2 P. W. 79, that their right was in some respects better than that of the widow to her paraphernalia. But it may be inferred from other cases, that upon a deficiency of assets, the widow would be preferred to the specific as well as to the general legatees (see 1 P. W. 731. 2 Atk. 78. 3 Atk. 369). In Graham v. Londonderry, 3 Atk. 395, Lord Hardwicke puts the case of a specific bequest, and says that the right of the wife is superior to that of any legatee.

(*a*) 2 P. Will. 542, and see the cases collected in the "Law of Legacies," under the title marshalling of assets, vol. 1, p. 456, 2 ed.

As to the *bona paraphernalia* of the widow, the Master of the Rolls said, that although there were debts more than the personal estate would extend to pay, yet as such goods were liable only in favour of creditors and *not* of the heir nor of the *devisee*, who stood in the place of the heir, and was *hæres factus*, if the lands devised were sufficient to pay the recognizance the paraphernalia should be enjoyed by the widow.

Also in *Tipping* v. *Tipping* (*a*), the husband before marriage *covenanted* for himself and heirs with his wife's trustees, to invest 3500*l.* in a purchase of lands to be settled upon her in jointure, remainder to the first and other son and sons of the marriage successively in tail male. He died intestate and without issue, leaving assets in fee descending to his nephew and *heir*. The personal estate was insufficient to pay his debts. His widow and administratrix filed a bill against the heir to compel him to make good her jointure, and to have the deficiency of the personal supplied out of the real assets. She had jewels, &c. of about 200*l.* value, which were her *paraphernalia;* and the question was, whether those articles should in the first place be liable to satisfy the covenant in ease of the real estate *descended*, they being personal estate, which in general ought to be so applied. And *Lord Macclesfield* said, that *bona paraphernalia* were only liable to creditors and not to an heir, and that specialty creditors were unconcerned in the question, as having under their securities a right to go against the land, it was indifferent to them whether they were paid out of the real assets, or the *bona paraphernalia;* putting them aside, therefore, the wife should *retain* her *bona paraphernalia*.

And in *Boynton* v. *Parkhurst* (*b*), *Sir Griffith Boynton* by his will empowered his wife (whom he

(*a*) 1 P. Will. 729.

(*b*) 1 Bro. C. C. 576. 1 Cox, 106.

made executrix) to raise by mortgage of a particular real estate, a sufficient sum of money for payment of his debts, in aid of his personal estate, and devised to her the use of her jewels for life. The cause coming on for further directions, a question arose, whether the wife was not intitled to the jewels absolutely, as her *paraphernalia*, although the personal estate was not sufficient to pay the debts, or whether they should be applied before the real estate charged with the debts? And upon the authority of the last case of *Tipping* v. *Tipping*, *Lord Thurlow* decreed the jewels to the wife in prejudice of the charged estate.

As to widow's right to receive value of paraphernalia out of contingent or future assets of her husband.

In *Burton* v. *Pierpoint* (*a*), *Lord Macclesfield* said, "that if there should not be assets real and personal at the *testator's death, or at least at the time when the jewels or paraphernalia were applied to debts*, then the paraphernalia should be liable," meaning that they should be so applied, and the widow have no compensation at a subsequent period, although at the time when the paraphernalia were so applied there was a possibility of assets *in future*, as upon a failure of issue, which afterwards happened; for his Lordship observed, that such a remote contingency was not to be regarded, since the event was such as might not take place for many years after the testator's death, or even not till after the widow's decease, when the end and design of her paraphernalia could not be answered. In the present case the husband at his death was seised of a reversion in fee expectant on the failure of issue male. He had also a small unsettled freehold estate, and bequeathed to his wife her jewels and plate for life, and devised all his real estate to *B* subject to debts and legacies. He left two infant sons, and at that time his real and personal assets were insufficient for the payment of his debts, so that his wife's paraphernalia were

(*a*) 2 P. Will. 79.

applied towards making up the deficiency. The sons afterwards died minors, and without having been married, by which events the reversion in fee falling in became liable to debts under the will. And *Lord Macclesfield*, after expressing himself as above, decreed that as there was an *express* bequest of the jewels to the widow, notwithstanding that at the testator's death there were neither real nor personal assets, yet since afterwards, though by a remote accident, assets had happened, there could be no inconvenience to any creditors or other persons, and that the legacy should be paid, and the intention of the testator performed; and the rather, for that the real and personal assets were by the will made liable to the debts and *legacies*.

The above distinction taken by *Lord Macclesfield* seems to be founded upon this principle, that when the wife's right is left to the provision of law, and the real and personal assets are insufficient to pay his debts, then for the sake of the creditors her paraphernalia must be applied in payment of their demands, and not detained from them in expectation of that which may never happen, a contingency of subsequent assets falling in; and that such possibility or contingency happening after the paraphernalia are so applied shall not for the sake of certainty and quiet, as also from the nature of such provision, intitle the wife, or the persons claiming under her, to institute proceedings for the purpose of recovering out of the accidental assets the value of the paraphernalia which had been so applied. But when they are given to the wife by will, and the real and personal assets are charged with debts and legacies, then since the wife is made a *legatee* of her paraphernalia, she as well as any other legatee or her representative will be intitled to an execution of the trust, and, upon the assets falling in, to have them applied in the discharge of such legacy.

4. If the alienation by the husband in his lifetime of the wife's paraphernalia be not absolute, but as a

Her equity when paraphernalia

are pledged by her husband.

pledge or security for money, his wife surviving him will be intitled to have them redeemed out of his personal estate, even to the prejudice of *legatees*, because her right is anterior and to be preferred to their claims, which are merely voluntary (*a*).

Paraphernalia barred by settlement.

The widow may bar her right to her paraphernalia by settlement in like manner as has been before mentioned in regard to her title by the custom of *London*, and under the statute of distribution.

Thus in *Cholmely* v. *Cholmely* (*b*), the widow by marriage articles stipulated that she should have nothing of her then intended husband's personal estate but what he should devise to her, and the Court declared that she was barred not only of her customary part, but also of her paraphernalia.

And by widow's acquiescence.

5. Another bar occurs when the husband takes upon himself to bequeath to his wife her paraphernalia for life, and she does not claim them absolutely by her elder title as paraphernalia; in this case, it is presumed, that her administrator after her death will not be intitled to them; and such seems to have been the opinion of the Court in the case of *Clarges* v. *Albemarle* (*c*). There the husband bequeathed to his wife for life her paraphernalia. She died without having elected to take them absolutely against the will; and according to *Mr. Vernon*, the Court allowed a plea to the bill of her administrator praying payment of their full value.

Hence it is to be considered as a legal inference, that if a widow, when her paraphernalia are bequeathed to her for life, do not manifest by some act her intention to take them by her elder and better title, she will be presumed to have elected to take them under the will, so as to bind her executor or administrator.

(*a*) 3 Atk. 395. (*b*) 2 Vern. 83. (*c*) 2 Vern. 247.

CHAPTER XVIII.

THE WIFE'S POWER OVER HER SEPARATE PROPERTY IN OPPOSITION TO THE MARITAL RIGHTS OF HER HUSBAND.

UNDER this title will be considered:—

I. *The effects upon the husband's marital rights of limitations of real and personal estates, made to the wife's separate use, when* no trustees *are appointed for her benefit.*

II. *The effect upon such rights of a* mere agreement *between husband and wife that she shall dispose of her real or personal estate.*

III. *What clauses or expressions will and will not create a* trust *for the wife's* separate use. And,

IV. *Of the wife's separate trading under her husband's agreement before and after marriage.*

It appears in former parts of this treatise (*a*), that the common law would not permit the wife to take or enjoy real or personal estate separate from and independent of her husband, except in cases of necessity, which have been before considered (*b*). But this rule or disability has been further relaxed or removed in modern times; and even in Courts of Law, as it will afterwards appear, the capacity of the wife to enjoy property separate from her husband has been acknowledged.

Although no trustees be appointed

1. The interposition of trustees seems at the first to have been deemed essentially necessary in order to pro-

(*a*) Vol. 1, pp. 3. 53. 169. (*b*) *Supra*, p. 120.

for wife under a limitation to her separate use, equity will convert her husband into a trustee for her.

tect the wife's separate interest (*a*), and regularly when property is intended to be given or settled upon married women for their separate uses, it ought to be vested in trustees for them (*b*); but it has been established ever since the year 1725, that if land or personalty be devised or settled to or upon a married woman for her separate use without the precaution of vesting it in trustees, still, in equity, the intention will be effectuated, and the wife's interests protected by the conversion of her husband into a trustee for her.

Instances.

Thus in *Bennet* v. *Davis* (*c*), *A* devised his real estates to his daughter *B*, the wife of *C*, in fee for her *separate* use, exclusively of her husband; and he declared that *C* should not be tenant by the curtesy, nor have the lands for his life if he survived *B*; but that on *B*'s death they should descend to *B*'s heirs. The defendant *Davis* was assignee under a commission of bankruptcy which had issued against *C*; and upon the wife's bill to compel an assignment of the lands to her *separate* use, that was resisted by *Davis*, upon the principle that the estate not having been conveyed to trustees for the wife's separate use, the husband's legal right to the profits attached, notwithstanding the contrary intention apparent upon the will, and that therefore he, *Davis*, as the husband's assignee, was intitled to them; but the Master of the Rolls decreed in favour of the wife, declaring that the husband took as a trustee for her, and that there was no difference where the trust was created by the act of the party, and where by the act of the law; also that the assignee, claiming under the husband, took the property, subject to the same trust.

The following case was on a chattel interest. In

(*a*) Harvey v. Harvey, 1 P. W. 125. Burton v. Pierpoint, 2 P. Will. 19. (*b*) For the forms of a settlement of *real*, and a gift by will of *personal* estate, to the separate use of a married woman, see Append. No. 14. and No. 15. (*c*) 2 P. Will. 316.

Parker v. *Brooke* (*a*), the testator bequeathed to the separate use of his daughter (a married woman) for life, remainder to her children, leasehold estates after the death of her mother; and although no trustees were interposed, the husband was considered a trustee for his wife. Upon the same subject, *Lord Eldon* said in *Rich* v. *Cockell* (*b*), that it was perfectly settled that a husband might in a Court of Equity be a trustee for the separate use of his wife.

A Court of Law has even extended its protection to the wife against the husband, when no trustees were appointed in the deed by which her title to separate property was created, holding that persons named in a will as trustees for the person from whom she claimed, were also to be considered trustees for her.

Instance where a Court of Law would not interfere for husband, although no trustees were appointed in the deed limiting property to his wife's separate use.

Accordingly, in *Davison* v. *Atkinson* (*c*), the testator devised some lands in which collieries had since been discovered, to three persons, in trust to sell for the benefit of others, of whom *B*, (afterwards the wife of *A*,) was one; and until sale, the trustees were to receive the rents, and to pay a part of them to *B*, for her sole and separate use. The lands were not sold, and the trustees let the collieries. Before *B*'s marriage, she conveyed one-eighth part of the profits of the collieries to *C*, the plaintiff's wife (*not to a trustee for her*), to her sole and separate use. The trustees in the will having no notice of the conveyance to *C*, paid to *B* her share of the rent under the will. *C*'s husband brought an action of *assumpsit* against the husband of *B*, to recover one-eighth part of the rent, upon the ground that as no trustee was appointed for the plaintiff's wife in the conveyance made to her, it was in law a conveyance to the husband, who alone had a right to sue for the money; but the Court held, that the trustees

(*a*) 9 Ves. 583. (*b*) Ibid. 375. (*c*) 5 Term Rep. 434.

under the will, in whom the legal estate was vested, were to be considered as trustees for *C*, the plaintiff's wife, and that the husband was not intitled to recover in the action; *Lord Kenyon* observing, that the interests of the plaintiff and his wife were in direct opposition to each other, and that if the Court permitted him to recover the money which was intended for her separate use, her separate right would be destroyed.

So also property expressly given to husband for his wife's separate use, will make him her trustee.

The above are cases where the property was given by strangers to the wife's separate use; but the principle equally applies, and even more strongly, when the estate is given *to* the husband for her separate use (*a*). In these instances he will be a *trustee* for his wife of such property, and the wife's equity to it will be enforced against assignees in bankruptcy, and under the insolvent debtor's acts, and against trustees under conveyance from the husband to pay debts (*b*). But the title of a purchaser from the husband, without notice of the trust, will not be disturbed in equity; for when the equities of the parties are equal, and the property is equitable, that Court will not act for the purpose of taking from a *bonâ fide* purchaser the property which he has acquired for a valuable consideration: if, however, he or his agent in the transaction, had *notice* of the trust prior to the completion of the purchase, he will then be bound by the wife's equity, and be equally a trustee for her as her husband was previously to the sale and conveyance.

And although not against a *bonâ fide* purchaser, yet if he have notice of the trust, he also will be bound by it.

Accordingly, in *Parker* v. *Brooke* (*c*), before referred to, and in part stated, the husband in the year 1791 mortgaged leasehold estates which were bequeathed to his wife's *separate* use for life, remainder to her children, without the intervention of a trustee;

(*a*) 3 Atk. 399. 9 Ves. 369. (*b*) See *ante*, p. 87.
(*c*) 9 Ves. 583.

and he obtained reversionary leases of the premises for 99 years, determinable on a life. He also in 1792 made another mortgage of all the premises; which securities were in 1794 agreed to be assigned to the defendant *Brooke*, but which agreement was not carried into effect. In 1800 *Brooke* obtained possession of the lands, in an ejectment brought by him against the husband, upon the latter's confession of the action. The husband then died, and after that event the wife and her child filed a bill against *Brooke* and the mortgagees, charging them with notice of the will, and that *Brooke* obtained possession of the premises in collusion with the husband, &c; and they prayed an assignment of the original terms to trustees for them, upon the trusts of the will, cancellation of the mortgages, delivery up of the reversionary leases, possession of the premises, and an account of profits on payment of the fines. *Brooke* insisted upon his agreement, as being for a *valuable* consideration. The mortgagees stated (in answer to a charge in the bill), that the mortgage monies were paid when the securities were obtained. It was in evidence that the *reversionary* leases were beneficial, and were granted to the husband upon his representations that he was intitled to the privilege of those reversionary leases under the will of the former tenant. *Sir William Grant*, Master of the Rolls, decided that there was no distinction between the mortgage of the original and of the reversionary leases, that the *trust* in both cases referred to the same circumstances, and that there was equally *notice* in both. His Honor observed, that the whole originated in mistake of the law, and the effect of the omission of trustees; that there was complete *notice*, for *those who drew the deed* introduced the history of the transaction, as laying the foundation for the husband's right to the renewed lease. The decree was in favour of the wife and child, and an account directed, in conformity with the prayer of the bill.

It is settled, therefore, that when the intention appears that the property bequeathed to or settled upon the wife, should be to her sole and separate use, whether it be so given immediately to her, without the intervention of trustees, or to her husband for her, a Court of Equity will effectuate the intention by converting the husband into a trustee for his wife.

Husband's agreement in writing before marriage, that his wife shall have separate property, converts him into her trustee.

II. The same principle of equity applies and prevails when the husband *before* marriage *agrees*, by writing, that his wife shall be intitled to specific parts of real or personal estate for her separate use, but from the property not having been so actually settled, the legal title to it becomes vested in him by the subsequent marriage. In all such cases the husband will be a trustee of the funds for the wife's separate use; which trust will bind all persons succeeding to the property through him, with such qualification as noticed in the last section.

Agreement must be in writing.

But such agreement must be in writing, or the non-reduction of it into writing must be owing to the fraudulent conduct of the husband, otherwise the statute of frauds will interpose between the wife's equity and the liability of the husband to perform his promise. This subject having been discussed in the first volume (*a*), the reader is referred to it.

And if a settlement before marriage be insufficient to secure property to wife's separate use, the Court will correct it.

When, however, a settlement is actually made *before* the marriage, and it appears from it to have been intended to secure the wife's property for her separate use, but the deed, as framed, is defective in that particular, a Court of Equity will rectify the mistake from the internal evidence in the instrument (*b*). But if such evidence cannot be collected from the deed, *parol* testimony is inadmissible to prove such intention (*c*);

(*a*) Page 306. (*b*) *Ante*, p. 92. (*c*) But where a plain mistake has been made in preparing the instrument, parol evidence is admissible, though received with great caution. See the

neither can any writing executed subsequently to the completion of the settlement, be permitted to alter it. If, indeed, an error be discovered in the deed *prior* to its execution, and a party to it refuse for that reason to sign it until a memorandum in writing, corrective of the mistake, be prepared and signed by a party or parties to the settlement, in that case the deed will be altered or controlled by the subsequent instrument, in that particular, as it was admitted in *Tyrrell* v. *Hope* (*a*); because both instruments were executed at the same time, and are to be considered and construed as one deed. So also when a settlement is made *after* marriage, in pursuance of *articles* entered into before its celebration, and the deed is required for the above reason to be rectified, a Court of Equity will not comply with the request without a production of such articles, or other competent evidence of their contents, if the original be lost (*b*).

When settlement after marriage, not corrected by articles before marriage.

What will and will not be a good settlement by the husband to the separate use of his wife, against his creditors, or a purchaser, the reader will find treated of in the eighth chapter of the first volume.

What will raise a trust for the wife's separate use.

III. That which I propose now to consider, is what clauses or expressions have been deemed sufficient to raise a trust for the separate use of the wife, and what have not been so considered.

1. The expressions which have been held sufficient to raise a trust for the wife's separate use.

It appears from the cases before cited, that the words "to the wife's sole and separate use," are sufficient (*c*). Indeed, whenever it appears, either from

cases collected in Sugden on Vendors and Purchasers, 5th edit. p. 141, *et seq.* Barstow v. Kilvington, 5 Ves. 593. Beaumont v. Bramley, 1 Turn. Ch. Rep. 41. Ball v. Storie, 1 Sim. and Stu. 210.

(*a*) 2 Atk. 558—560, stated in the next page. (*b*) Cordwell v. Mackrill, Ambl. 517. (*c*) To which may be added the cases of Adamson v. Armitage, Coop. Rep. 283, 19 Ves. 416, and ex parte Ray, 1 Madd. 199.

the nature of the transaction, as in the instance of a settlement in the contemplation of marriage, where the husband is a party, or from the whole context of the instrument limiting to the wife the property, that she was intended to have it to her sole use, that intention will be carried into effect by a Court of Equity.

Thus in *Tyrrell* v. *Hope* (*a*), (the case of a settlement before marriage), when the deed was read over to the wife, and before its execution, she observed that there was a mistake, for that the moiety of certain premises limited to her mother for life, was after her death limited to the husband for life, and not to her own separate use, as had been agreed upon; she therefore having refused to execute the settlement unless the mistake was rectified, the husband signed a note, by which he agreed with his intended wife, that "she should *enjoy* and *receive* the issue and profits of a moiety of the estate then in the possession of her mother, after the mother's death." This note was satisfactory, and then the wife executed the settlement. The husband having become a bankrupt, the Master of the Rolls decided against the claims of the husband's assignees to his property, holding that it was a trust in the husband to the wife's separate use. His Honor observed, that the words in the note could admit of no other construction than that the property should be for the wife's separate use; and asked, to what end she should *receive* the profits, if they were to be the husband's property the next moment. He added, that the word *enjoy*, was very strong to imply a *separate* use to the wife.

The words, to enjoy and receive.

So also in *Darley* v. *Darley* (*b*), *Lord Hardwicke* is reported to have said that technical words were not necessary to create a separate trust for the wife, and that the word "livelihood," was sufficient to show the

For the livelihood of the wife.

(*a*) 2 Atk. 558. (*b*) 3 Atk. 399.

intention of the donor that the property should be to her sole and separate use. According to this opinion, if a devise were made to the husband, or a trustee for the wife's livelihood, the property would not belong to the husband, but to his wife as a feme sole. Again,

In *Lee* v. *Prieaux* (*a*), the testatrix bequeathed to *Ann Hill*, widow, for life, an annuity of 10*l*., out of certain stock which she vested in a trustee; and she directed the surplus dividends to be paid to *Sophia Lee*, a married woman; she also ordered the whole dividends to be paid to *Sophia* after the annuitant's death, during *Sophia*'s life: and she declared that her trustee "should not be troubled to see to the application of any sum or sums paid to the said *Ann Hill* and *Sophia Lee, but that their receipts in writing should be sufficient discharges to her said trustee,*" &c. *Lord Alvanley* was of opinion, that although the words "notwithstanding the coverture of *Sophia Lee,*" were omitted, and no notice of her then marriage was taken, yet that the other expressions in the clause were sufficient to intitle the wife to the dividends as her separate property. His Honor observed, that two women were the objects of the testatrix's bounty; the one a widow, and the other a married woman. With respect to the former, the testatrix might have used these words as a caution against any future husband having a right to the money; they must have their meaning, and that probably the testatrix might have inserted the words, "her receipt shall be a sufficient discharge," in consideration of *Sophia* being a married woman, who was in that situation, which otherwise prevented her giving such an acquittance; and that if these words had no meaning, the testatrix might as well have omitted them. His Honor was therefore of opinion, that there was a clear intent to be collected from the

That the wife's receipt shall be a sufficient discharge.

(*a*) 3 Bro. C. C. 382.

words of the clause, that the testatrix meant *Sophia*, though a married woman, should have the power to give a *discharge*, so as to bar her husband.

Payment directed into the wife's own hands.

The next case which occurs is *Hartley* v. *Hurle* (*a*). There the testator gave the annual produce of the trust fund created by his will, subject to debts, legacies, and annuities, &c., in trust for his daughter *Ann Hurle* as therein mentioned, to be paid by his trustees *into her proper hands;* and *Lord Alvanley* said, he conceived that this was to her sole and separate use (*b*).

Or that securities for money shall be given up to her by the executors, on demand.

So also in *Dixon* v. *Olmius* (*c*), the bequest was of a bond and mortgage debts to the testator's niece *B*, a married woman, with a direction that they should be delivered up to her *whenever she should demand or require the same.* The question was, whether these securities were to be considered as given to *B* for her separate use? And the Chancellor said, that as these securities were to be given up to *B on her demand*, her husband could not have obtained them from the executors *without a demand made by B*, which gave her the *dominion* over them; they must therefore be considered as given to her *separate* use.

[A legacy to a married woman for her own use, and at her own disposal, vests in her as separate estate (*d*).

A gift of stock to trustees, in trust to pay the dividends to a married woman for her separate use, not limited to her life or any other period, gives her an absolute right to the capital (*e*)].

Instance at law of a trust raised for wife's separate use, against marital right of second husband.

In the following case, the intention was considered to be sufficiently clear to raise a trust for the wife's separate use, against a second husband. Lands were devised to trustees, in trust to pay the rents and profits

(*a*) 5 Ves. jun. 540. (*b*) See 18 Ves. jun. 434. (*c*) 2 Cox's Rep. 414. (*d*) Prichard v. Ames, 1 Turn. Ch. Rep. 222. (*e*) Elton v. Shepherd, 1 Bro. C. C. 532. Haig v. Swiney, 1 Sim. and Stu. 487.

to his daughter *F*, for life, who was then married, or to such person as she should appoint, notwithstanding her coverture, but not into her husband's hands; with a direction that such rents and profits should not be subject to any control, management, or disposal of her husband, nor liable to any debts which he had or should contract: the same being expressed to be designed by the testator for the wife's separate use and benefit, and to be at her own disposal notwithstanding coverture, with remainder (after inserting trustees to preserve contingent remainders) to the issue male of *B* in tail, remainder to her issue female. *F*'s husband died between the date of the will and the making of the codicil after mentioned, and she married *G* after the testator's death. The codicil noticed the death of *F*'s first husband, and *confirmed* the will in all particulars not altered or revoked by it. Question, whether under the will and codicil, the separate enjoyment of the rents, &c., by *F*, was confined to the life of the first husband, or whether it was available against every *future* husband? And it was determined, that according to the true construction of the will and codicil, the latter expressly mentioning the death of the first husband, and still continuing the restriction, the testator intended that his daughter should enjoy the lands free from the control of any husband (*a*).

Construction of clauses according to which a trust for wife's separate use was not raised.

2. Expressions which have been held insufficient to raise a trust for the wife's separate use.

It must be observed, that Courts of Equity will not deprive the husband of his wife's property, to which he is by law intitled, unless the intention be clear that he was not to derive any benefit from it, and that it should be for the personal use and disposition of his wife (*b*).

(*a*) Beable v. Dodd, 1 Term. Rep. 193. See Horseman v. Abbey, 1 Jac. and Walk. 381. See also title "Curtesy," vol. i. chap. 1, p. 18, et seq. (*b*) See chap. 1, and pages last referred to, also Rich v. Cockell, 9 Ves. 370, 377.

Thus in *Brown* v. *Clark* (*a*), the testator bequeathed to his sister *A*, (a married woman) and to *B*, the interest of his residuary estate, in equal shares; and upon *A*'s death, half of the principal was to be divided amongst her children, of which the husband was to have no part, but it was to be entirely for the children; and if she had none alive, then the *sum* was to be equally divided amongst *B*'s children; and after the deaths of *B* and wife, the other half of the *principal* was to go in like manner amongst his children. It was contended on the part of *A*, that as it was expressed that the husband should have no part whatever, the bequest to the wife was a trust for her separate use; but *Lord Alvanley* was of opinion that those words were only applicable to the *principal* money, of which the wife had no share, and not to the *interest*, to a moiety of which she was intitled for life: the interest therefore being given to her without qualification or restriction, it was subject to the right of her husband.

So, also, in *Dakins* v. *Beresford* (*b*), *B* devised property to *C*, in trust to sell, and out of the produce "to purchase, in his own name, an annuity of 80*l*., for the life of the wife of *D*, and to pay the same to her and her assigns." *D*, although living apart from his wife, claimed the annuity; which demand was resisted, upon the ground that it was the intention of the testator that the wife should enjoy the annuity to her separate use, manifested in the direction to *C*, to purchase it in his own name, in trust for the wife of *D*; but the *Master of the Rolls* declared, that as there were no negative words in the will to exclude the husband, he could not deprive him of his legal right to the annuity.

It is observable in the last case, that the bequest amounted to no more than to a trust to pay an annuity to the wife for life. Such a bequest, therefore, did not

(*a*) 3 Ves. 166. (*b*) 1 Cha. Ca. 194.

afford that clear intention to exclude the husband from his marital right, as a Court of Equity requires for that purpose; the mere interposition of a trustee never having been held sufficient to manifest any such intent. Again,

In *Lumb* v. *Milnes* (*a*), *A* bequeathed his residuary personal estate to trustees, in trust to pay half yearly, a part, or the whole of the interest, upon a certain event, to his niece *B*, (the wife of *C*,) for life, and to apply the capital to such uses, &c., as *B*, *whether sole* or *married*, should appoint, as therein mentioned; and in case of no appointment, then to the use of *B*'s legal representatives, including *C*, if then living. The question was, whether under the above bequest, *B* was intitled to receive the interest of *A*'s residuary estate separate from, and independently of her husband, or whether his assignees (he having become a bankrupt) were intitled to it during her life. And *Lord Alvanley* was of opinion, that the words of the will were not sufficient to give the annuity to *B*'s separate use, and that therefore the assignees were intitled to it upon making a provision for her.

This case appears to be the same in principle with that of *Brown* v. *Clark*, for there is no qualification nor restriction whatever in the direction as to the payment of the interest to the wife.

Equally insufficient is a direction to pay to her, to and for her use.

In another case, of *Jacobs* v. *Amyatt*, in a note to *Beresford* v. *Hobson* (*b*), the testatrix bequeathed the residue of her estate to or in favour of *B*, then a minor, and unmarried, to be placed at interest until she attained the age of twenty-one, or married; in either of which events she was to receive the capital, with the accumulations that were directed to be paid *to her, to and for her use* during her life, with limitations over. She married under age, and claimed the property as be-

(*a*) 5 Ves. 517. (*b*) 1 Mad. 376.

queathed to her separate use; but the Master of the Rolls, by whom the cause was first heard, decided against her claim in favour of the husband's marital right; and his Honor's decree was afterwards confirmed by the Chancellor upon appeal.

In two particulars the last case differs from those before referred to, where dispositions to the *sole* uses, or to the *separate* uses of the wives, were considered as sufficient to raise trusts for their separate uses. The first particular of difference is, that at the date of the will, *B* was unmarried; and the second, is the omission of the above restrictive expressions; and it seems that for the want of the words sole or separate, the expression "for her use," evinced no clear intention that the testator meant to exclude the right which a future husband might have in the fruits of the bequest. The immediately preceding direction to pay *to her*, &c., includes what follows, viz. "to and for her use;" so that the latter words are redundant, and mere repetition: a practice, or a mode of expression, not unusual in the preparation of deeds and wills.

Or to and for her "own" use.

If the word *own* had been introduced in the last case, that addition would not, as it seems, have raised a trust for the wife's separate use; and so it appears from a manuscript note, upon a case of *Johnes* v. *Lockhart*, made by *Lord Colchester*, then a practitioner at the Chancery bar; a case decided by *Lord Alvanley*, and to be found in the Registrar's book, 1792, A. 439, *b*, as also in *Mr. Belt*'s edition of *Mr. Brown*'s Chancery Reports (*a*). *Lord Colchester*'s note is in the following words: "*Johnes* v. *Lockhart*.—Legacy to a feme covert to her *own* use and benefit, is *not* to her separate use; and *Master of the Rolls* said he would not go beyond *Lee* v. *Prieaux*, 3 *Bro.* 381. Legacy to husband and wife, but so as that husband should not dis-

(*a*) 3 Bro. C. C. p. 383.

pose of it without her consent; this is to her separate use."

[And in two subsequent cases (*a*), a legacy to a married woman for her own use and benefit, has been held not to be separate property.

When a testator gave a moiety of the residue of his estate to the husband and another person as trustees, in trust for the wife for her life, the circumstance of the husband being named as one of the trustees, was held not to be a sufficient ground for inferring that the testator intended that she should take the life interest in the trust fund to her separate use: it was not necessary to determine what might be the inference if the husband was named as the sole trustee of a fund given to the wife for life (*b*)].

Wife's separate trading under husband's agreement.

IV. Independently of the acquirement by the wife of separate property by the means before mentioned, she may do so by carrying on trade on her own separate account, apart from and without the interference of her husband. Her character as a feme sole trader under the custom of *London* has been before discussed (*c*). Her ability to carry on such business on her own individual account, now to be considered, does not arise from any particular custom, but in consequence of the express agreement between her and her husband *before* marriage, or from his *subsequent* permission. When the agreement is made *previously* to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. When the agreement originates *during* the marriage, it will be void against his creditors, but good against himself, for the reasons mentioned in a preceding chapter of this

Validity against his creditors.

(*a*) Wills v. Sayers, 4 Madd. 409. Roberts v. Spicer, 5 Madd. 491. (*b*) Ex parte Beilby, 1 Glyn and J. 167. (*c*) *Supra*, p. 124.

work, which treats of the validity of settlements made before and after marriage (*a*).

In order to illustrate the present subject, it will be proper to show how this privilege of the wife stands at law and in equity.

1. As to the *legal* power of the wife to carry on trade upon her separate account during the marriage.

Wife's power at *law* to carry on a separate trade.

Upon the abstract question of this the wife's ability, *Lord Mansfield* observed (*b*), "that whether by any means a man might before marriage put his intended wife in a situation to carry on a separate trade, there was no authority that he might not do so." If, then, property be vested in trustees before marriage, to enable the wife to carry on business upon her sole account and for her separate use, the disability of coverture will be so far removed, that the transaction will be established against the husband and his creditors, and the separate character of the wife as a *feme sole* will be acknowledged; and for the reasons mentioned in the case next stated, it is unnecessary that the assigned articles should be enumerated or specified in a schedule annexed to the settlement, if they can be otherwise identified. In such a case, the trustee of the wife will be intitled to the property assigned, and to its *increase and profits*, for her sole and separate use and benefit.

The principle.

The law considers the wife as the *agent* of her own trustee, and her possession as his possession. Upon the application of these principles, the goods assigned and in the possession of the wife will be protected for her, and excepted out of the general rule of the common law, according to which a married woman can have no property during the coverture, but all her estate is vested in her husband: and upon the same principles, the goods assigned and in the *possession* of the wife will be protected against the operation of the statute

Stock in trade the wife's separate property,

(*a*) Vol. i. p. 288, *et seq.* (*b*) 3 Term Rep. 620, *in notis.*

of *James* the *first* (*a*), which vests in the husband's assignees in bankruptcy all such personal estate as at the time of his becoming a bankrupt should by the *consent* of the *true owner* be in the bankrupt's *possession, order, and disposition,* and of which he should be the reputed owner, and take upon himself the *sale, alteration,* or *disposition,* as owner, &c.

and protected against stat. of James I.

Thus, in *Jarman* v. *Wolloton* (*b*), by a settlement before marriage, reciting an agreement that the wife's stock in trade, book debts, &c. should be assigned to a trustee for her separate use and disposal, to the intent that she might carry on her trade at her own risk and charges, and for her own separate and exclusive benefit, she assigned to *A* all her stock in trade and other effects at, in, or about *C*, and all book and other debts then or afterwards to become due to her in the course of her business (of a milliner), and all other her moneys and effects in her trade, in trust for her *separate use.* There was not any schedule of the property annexed to the deed or referred to; but of the furniture and some of the articles an inventory was kept by the trustee. For some time after the marriage, the wife carried on her trade separately, and in a different house from her husband; but latterly all her effects were removed to his house, and she carried on her business in a separate apartment. The husband paid the rent of the house, and was at the expense of fitting up the shop. The husband having become a bankrupt, the trustee brought an action of trover for recovery of goods and furniture, which he claimed under the settlement for the separate use of the wife; but the jury found that the wife's business was not carried on separately from her husband, and therefore gave a verdict for the as-

(*a*) 21 Jac. 1. c. 19. sect. 11. (*b*) 3 Term Rep. 618. See ex parte Martin, 2 Rose, 331. 19 Ves. 491.

signees as to the stock in trade, and a verdict for the trustee for the furniture. The latter of which verdicts having been unsatisfactory to the assignees, a new trial was moved for, upon the grounds that either the trust deed did not protect the property, or that the assignees were intitled to retain the possession under the statute of *James* the *first* (*a*). As to the first, the Court decided that the deed was valid, the husband and wife being parties to it, and that it protected the goods, &c. comprised in it for the wife's separate use; also, that the want of a *schedule* to the deed specifying the property assigned was immaterial, for it would have given no public notice or information, and it would have been only known to the persons interested in the settlement. As to the second point, the Court said, that the husband had not the order and disposition of the property *with the consent* of *the real* owner, to make the case fall within the statute; for the *trustee* was the legal owner, who never consented, and the wife's possession of the goods was as *agent* of such trustee. The Court, therefore, refused to grant a new trial.

In the last case, that of *Haselinton* v. *Gill* (*b*) was acknowledged, in which *Lord Mansfield* said, that wherever such a trust could be supported in equity, the trustee would be intitled in a Court of Law. That was a case of the assignment to trustees for the separate use of the wife by a settlement before marriage of a number of her cows, &c. and of the *increase* and *produce* from them. Some of the cows, and of their increase, were taken in execution for the husband's debt, and for which cows, &c. an action of trover was brought by the trustees, who recovered in the action not only the value of the cows, but of their *increase*. And with respect to the latter, *Buller*, J., said, it was the same

(*a*) 21 Jac. 1 Chap. 19. (*b*) 3 Term Rep. 620, *in notis*.

as if the wife had paid the produce arising from the original cows to the trustees, and they had purchased the *other* cows, for she acted as the agent of her trustees. But *Lord Mansfield* observed, "that if the husband had carried on the trade in his own name, and contracted debts in it, that would have varied the case."

In the above cases, we have seen upon what principle it is that a Court of Law by circuity changes in effect the character of wife into that of a single woman. That principle, however, does not apply even to transactions connected with the business, when the wife gives, negotiates, or takes securities *in her own name*; for, as it has been before observed, the common law vests all her personal estate in her husband; and the mode by which that is evaded by modern legal decisions in consistency with the rule, is by considering the wife as the *agent* of the trustee. But that construction cannot be made against actual expression to the contrary. Accordingly, if she give, negotiate, or accept *securities* for money in business *in her own name*, whether her separate trading be in consequence of such or the like settlements before marriage, as above noticed, or with the husband's consent after marriage, the securities given or negotiated will be void, and those taken by her will vest in him, together with the right to receive the money; subjects which have been treated upon in former parts of this work (*a*). But if she use the *name* of *her husband* in these transactions, then probably they would be supported at law, upon the presumption made in several other instances (*b*) of her having acted under *authority* from him.

But in carrying on business wife cannot accept, negotiate, or give securities in her own name;

In *Barlow* v. *Bishop* (*c*), a promissory note was

(*a*) *Ante*, pages 106, 124. (*b*) *Supra*, p. 108, *et seq.*
(*c*) 1 East, 432. 3 Esp. 266. See Cotes v. Davies, 1 Campb. 485.

made payable to, *or to the order of Ann Parry* (a married woman), who carried on business as a sole trader with the consent of her husband. The note was made payable to her in the course of her trade, and she indorsed it for value *in her own name*. The indorsee was not permitted to recover the amount of the note against the maker, because by the first delivery of the note it became vested in the husband, and she could not by indorsement in her own name transfer such interest; but *Lord Kenyon* said, that since the husband permitted her to carry on business on her own account, and the transaction of the note was in the course of the trade, if the wife had indorsed it in her husband's name, his Lordship was not prepared to have said, that that would not have availed, as many acts of that nature might be done by a power of attorney, and a jury might have presumed what was necessary in favour of an *authority* from her husband for the purpose.

yet *semble* that she may do so in her husband's name,

With respect to this doctrine at law, in regard to the validity of securities given by the wife when they are granted or accepted in *her own name*, and when in that of her husband, it is conceived that, in equity, securities given by or to the wife in her own name, for a debt which she is allowed to contract in respect of her separate property or separate business, will be established against herself in respect of such property, upon the principle of her power of acting as a *feme sole*, and her absolute dominion over such separate estate and concerns, as also upon the principle of a Court of Equity relieving against mistakes and mere forms; but this head of equity will be more fully considered in a subsequent part of this treatise.

and that securities, although given or accepted in wife's name, may be good in equity.

It may be inferred from the above opinion of *Lord Kenyon*, and what appears in prior parts of this work in regard to presumptions, that, at law, if the husband *after marriage* permit his wife to carry on business as a *feme sole*, her transactions in it with strangers will

When husband liable at law for wife's acts in carrying on separate trade with his permission.

bind him, upon his *presumed* authority to her, to do all necessary and proper acts for the purpose of carrying it on, except when that presumption cannot be raised for such or the like reasons as mentioned in the last case (*a*). But at law the *profits* are the husband's, there being no trustees, no obstacle to interpose between the rule of law, which vests in him all the wife's personal property accruing to her during the marriage, and her equitable title to it as her separate estate under the permission of her husband.

This, however, is not so in equity, which leads,—

2. To the *equitable* doctrine upon this subject.

Rule or doctrine upon this subject in *Equity*.

With respect to provisions made *previously* to marriage, for enabling the wife to carry on trade for her separate use, and the property is actually vested in trustees, the same rules prevail in equity as at law in regard to the husband, his creditors, and her title to the stock in business and profits to her sole use, and which have been before mentioned. So, also, in settlements *after* marriage, when the property is transferred to trustees for the purpose before stated, the same rules prevail in both jurisdictions, and the like distinctions taken between those settlements that are founded upon a *valuable* consideration, and those that are merely *voluntary*, which have been before considered (*b*). But the difficulty originating in legal forms (when no trustees are appointed for the wife) which fetter the proceedings of Courts of Law, does not occur in equity; since, as has been shown, a Court of Equity will make the husband a trustee for her separate use. If, therefore, the husband *merely agree*, in articles before the marriage, that his wife shall carry on business on her own sole account; or, without any such agreement, if he *permit* her to do so afterwards, all that she earns in

(*a*) See also *supra*, p. 113. (*b*) Vol. i. chap. 8.

the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it (*a*).

So also it will be if the husband desert her, and she by the aid of her friends carry on a separate trade for her support.

Thus, in *Cecil* v. *Juxon* (*b*), *A*, the daughter of *B*, married *C*, who deserted her with two infant children, and went abroad, and was absent for fourteen years. *B*, the mother, intrusted her with a stock of goods, proper for the business of a milliner and broker, and permitted her to take the profits for the maintenance of herself and children. *B*, in the division of her property, assigned to her *son D* personal estate, desiring him to assist *A*, by lending her such of the said goods as were necessary to enable her to support herself and family; *B* also assigned to her grand-daughter *E*, the daughter of *A*, the residue of her property. *A saved* 20*l.* out of her separate trading, which she lent upon bond, and afterwards a like sum upon a promissory note, both of which were, contrary to her knowledge at the time, *made payable to C, her husband.* *C*, upon his return from abroad, possessed himself of the goods lent to *A* to trade with, and the produce of the stock, for the redelivery of which, and payment of principal and interest on the bond and note, the bill was filed by the wife, &c. And *Sir Joseph Jekyll* said, that in consequence of the husband's desertion of his wife, the Court would consider the property acquired by her during his absence, to subsist herself and family, as her *separate property*, and not at the disposal of her husband. He therefore declared, that *A* was intitled to the goods which were in her possession, and to the

(*a*) See vid. *ante*, p. 140, note. (*b*) 1 Atk. 278.

stock in her separate trade *for her separate use;* also, that she was intitled to the bond and note, and decreed accordingly (*a*).

The next case upon this subject, is *Lamphir* v. *Creed* (*b*). There *A*, the wife of *B* (a soldier in a militia regiment, and residing with his regiment in a part of the kingdom at a distance from his wife), employed the plaintiff *C*, to purchase a sixteenth share of a lottery ticket, in which she agreed that *C* should be equally interested with her. At this time *A* carried on the business of a green-grocer apart from her husband, but there was no evidence of any assent of her husband to her separately carrying on this trade for her own use, except what could be inferred from his separate residence. The ticket was drawn a prize, and *A* refusing to permit *C* to participate in the good fortune, *C* instituted the present suit to accomplish that object; but *Sir William Grant* dismissed the bill, observing, that the purchase money of the ticket was the husband's, that the wife was incompetent to pass his interest in any part of its profits or produce, or to bind him by any contracts in regard to such his property, except those which were incident to the trade; and that as the purchase money was the husband's, so must

(*a*) It will be observed, that in this case the goods with which the wife carried on her separate trade had been assigned by the mother to her son, with a direction that they should be lent to the wife for the support of herself and family: a direction which did not give her the legal property, but which might reasonably be considered as a trust for her separate use. It seems to have been taken for granted, in Lamphir v. Creed, that the circumstance of the husband absenting himself, or permitting her to trade separately, would not alone divest him of his interest in property acquired by her. See also *ante*, p. 140, note.

(*b*) 8 Ves. 599. This case, as stated, consists of what appears from the Report, and from a MS. in the possession of Mr. Belt. *Note by the Author.*

be what it yielded, so that the plaintiff's title was defective.

This case seems to have been decided under its peculiar circumstances; for the fact of the husband's assent to his wife's separate trading was not established, and his absence was not such from whence an implication could arise that he consented that his wife's carrying on business should be for her own separate use; consequently the transaction was open to all the observations of the Master of the Rolls, founded upon the disabilities of coverture. It is presumed, however, that a contrary decision would have been made, if the money expended in the purchase had appeared to have been out of savings from a trade carried on by the wife with her husband's permission for her separate use, since they are disposable by her as she thinks proper, and in which her husband has no interest in equity.

Husband's liability in equity to wife's debts in her separate trade.

With respect to the husband's liability *in equity* to the debts contracted by the wife in her separate trade, the following conclusions may be probably drawn:—

1. Whenever the wife is to be considered as acting as a *feme sole*, and intitled to the profits of her separate trade as her sole and separate estate, the husband will not be liable to her engagements contracted in it. And the creditor cannot complain, since he trusted to *her* credit only, and it would be unjust to subject the husband to her debts, when he is not intitled to any of the profits. If, therefore, the husband be liable at law (as was intimated by *Lord Kenyon*, in the case of *Barlow* v. *Bishop*, before stated) (*a*) for the wife's debts in trade carried on by her with his permission, without the intervention of trustees, upon the *presumption* of her agency for him, a Court of Equity will, it is conceived, interfere on his behalf, to prevent the prose-

(*a*) *Supra*, p. 169.

cution of such a legal right, but at the same time subject the funds in the trade to the demands of her creditors.

2. When the property is legally vested in trustees to enable the wife to carry on trade for her sole and separate use, it is presumed, that the husband is absolved from all responsibility, even at law, for her debts contracted in it, and upon the presumption by which the law renders the husband liable in the instance before mentioned; for in such cases the wife is the agent, not of the husband, but of the trustee; the debts, therefore, are those of the trustee, and since he is *legally* intitled to the profits, he is legally responsible for the debts of his agent (the wife), incurred in conducting it. Still, nevertheless, since the wife is in equity the only person *beneficially* interested, it is conceived that a Court of Equity, acting upon the same principle as in the instance of the husband, will protect the trustee from such his legal responsibility, and confine the creditors to the assets in the trade (*a*).

Liability of her trustee at law, and in equity.

3. It is now settled that no action can be maintained against a married woman. Since, therefore, no legal demand can be established against her, it is considered that, under the construction of the statute law regulating the issuing of commissions of bankruptcy, no commission can be supported against her as a separate trader, notwithstanding *Lord Apsley*'s decision in *ex parte Preston* (*b*), for this case differs from that of a

Wife trading under such agreement cannot be made a bankrupt.

(*a*) But if the trustee or husband of a married woman, who carries on a separate trade, have, by permitting or sanctioning it, rendered themselves responsible at law for her debts, there seems to be no principle upon which a Court of Equity can relieve them from this liability as against the creditors. A trustee or executor, who, in the due execution of his trusts, carries on a trade for the benefit of his cestuique trusts, is not relieved from the personal responsibility which he incurs. 10 Ves. 120. 1 Buck. 209.

(*b*) Green, 8. See ex parte Mear. 2 Bro. C. C. 266.

feme sole trader in the city of *London*, the custom of which, as we have before seen (*a*), placing the wife at law in the situation of a single woman, enables her to make valid *legal* contracts, &c. and subjects her personally to answer for them.

(*a*) *Ante*, p. 124, *et seq.*

CHAPTER XIX.

THE WIFE'S POWERS OVER HER SEPARATE PROPERTY IN REGARD TO VOLUNTEER CLAIMANTS UNDER HER; AND THE INSTRUMENTS EXECUTING SUCH POWERS.

In the last chapter the marital rights of the husband were considered; and it is proposed to treat of the subjects arising out of the title of the present chapter under the following sections:

I. *The wife's power, under* agreement *between her and her husband before or after marriage, to dispose, as a feme sole, of her freehold estates during the marriage, by deed or will, so as to bind* her heir.

II. *Her power to dispose of her real and personal estates in favour of* volunteers, *when such estates are limited to her separate use, but no express power of disposition is provided or given.*

III. *Of the instruments which will be a due execution of powers in favour of* volunteers, *given to the wife to appoint by deed or will* generally, *and also when certain forms and particulars are required by the powers to be added to those instruments.*

I. It appears, from the authorities mentioned in the beginning of the last chapter (*a*), that if the intention were to give either real or personal estate to a married woman for her separate use, and the mode adopted for

(*a*) *Ante*, p. 156.

the purpose was by *limitation* expressly to herself, without the appointment of trustees (*a*), although the *form* be defective at law to accomplish the purpose, yet it will be supported in a Court of Equity, that Court converting the husband into a trustee of the property for the separate use of his wife. But in regard to *real* estate, it was unsettled previously to the case of *Wright* v. *Cadogan* (*b*) (finally determined in the House of Lords), and that of *Rippon* v. *Dawding* (*c*), whether the husband and wife by mere *agreement before*, and in contemplation of marriage, that she might dispose of *her* real estate by deed or will during the coverture, could enable her to defeat the right of her *heir*, after her death, by either of those instruments, since by descent of the *legal* estate he acquired a complete title at law. And it was doubted whether a Court of Equity could upon any principle affect the conscience of the heir, and oblige him to perform the agreement, since both the deed of a married woman without a fine and her will were void instruments from the disability of coverture, and the heir was not a party to the contract (*d*). *Lord Hardwicke* expressed his doubts upon the subject, in *Peacock* v. *Monk* (*e*), but the two cases before referred to have removed all uncertainty upon the subject, in determining that a Court of Equity will consider the *heir* as a trustee, and oblige him to make a conveyance to the party in favour of whom the wife appointed the property.

Agreement between husband and wife *before* marriage that she shall dispose of her *freehold* estates will bind her *heir*, and he will be a *trustee* for her appointee.

The principle applicable to the present case appears to be this; that the agreement having been made before marriage, at a period when the wife was able to

(*a*) For the form of an ante-nuptial settlement vesting the wife's real and personal estates in trustees to her separate use, see Append. No. 16. (*b*) 2 Eden, 239. 1 Bro. Parl. Ca. 486, S. C. (*c*) Ambl. 565. (*d*) See *supra*, p. 69. (*e*) 2 Ves. sen. 191. Bramhall v. Hall, Ambl. 467. 2 Eden. 220. See 2 Bro. C. C. 544. 2 T. R. 695. George v. ———, Ambl. 627.

contract; and as it clearly appears to have been the intention of the parties that the wife should reserve to herself a power to dispose of her own lands during the coverture, she, therefore, and the persons claiming under her appointment, have a right to the interposition of a Court of Equity to give full effect to the *marriage agreement*, and to remove any obstacles which, in point of form or otherwise, invalidated the appointment at law; the more especially since the wife might have obliged her husband to concur in a fine and settlement of the estates pursuant to his engagement, which a Court of Equity, according to its well-known practice, will consider to have been performed (*a*).

Such, then, being the rule of Equity in regard to the heir, upon an agreement between husband and wife *before* marriage, that she shall have a disposing power over her real estates when no conveyance of them to trustees is made for the purpose; a second question naturally follows, viz. whether the heir will be equally bound by such an agreement made *after* the marriage?

Contra if the agreement were made *after* marriage.

In answer to this question, it is to be observed that the before mentioned principle does not equally apply to an agreement after marriage as to one entered into before marriage, since in the former case the wife is disabled from entering into any contract in regard to her real property, either to bind herself or heir, and the husband's agreement can only be obligatory upon himself to the extent of his interest in the estate; so that the agreement in the present instance cannot, as it is presumed, bind the wife's heir, and convert him into a trustee of the *legal* estate, which he takes by descent, for the appointees of the wife. In *Dillon* v. *Grace* (*b*), *Lord Redesdale* marks the distinction between the two cases in these words: "In *Wright* v. *Englefield* (*c*),

(*a*) See Power v. Bailey, stated *infra*. (*b*) 2 Scho. and Lefroy, 463. (*c*) Ambl. 468.

and all the cases of that nature, the question was, whether a feme covert not having actually conveyed her estate, but having *previous* to her marriage entered into a contract to convey to certain uses, that contract (even so far as it was a stipulation for her own benefit), should be considered as binding against her own heirs, in the same manner as the contract of any other person? A Court of Equity held that *her* heir was bound as she was bound herself. This question could not arise in the case of a *mere contract* to convey entered into *after* marriage; for the wife's mere contract after marriage would have been void, whether made for her own benefit or that of other persons."

And there seems to be no difference in the application of the rule if the wife be *cestuique trust*, and have not the legal estate.

The above distinctions seem equally to prevail when the wife is *cestuique trust* of her real property, the legal estate being outstanding; because the same rule is applicable to a trust as to a legal estate, equity following the law. In *Wright* v. *Cadogan* (*a*), *Lord Northington* observed "that there was no rule so certain, so general, and so strongly adhered to by the ablest judges who had presided in equity, as to observe *in omnibus* the rules of law with respect to the regulation of property, and that such rules had been always strictly observed as principles in a Court of Equity."

If, then, the wife be *cestuique trust* in fee of real estates, and she and her husband, by articles in writing *before* marriage, agree that she shall have power to dispose of the trust property; her disposition will be good against her heir (*b*), as it has been shown to be in the instance first before mentioned, where the wife was seised of the legal estate.

But if the agreement be *after* marriage, as in the instance secondly before given, then, attending to the analogy of construction between legal and trust estates,

(*a*) 2 Eden. 258. See also 2 P. Will. 713. (*b*) See Wright v. Englefield, Ambl. 468.

such a contract would not have the effect of empowering the wife to appoint the absolute trust to the prejudice of her heir, who would be intitled to it at her death, if not disposed of by her in such a mode, as by law is allowed to married women to pass their estates during coverture.

With respect to real estates which may accrue to the wife during the marriage by deed or will, if no trustees be interposed, and the instruments express that the lands shall be to her separate use, and that she shall have power to dispose of them; although she take the legal fee, she may nevertheless appoint it, which will bind her heir and convert him into a trustee for the appointee, notwithstanding the case of *Goodhill* v. *Brigham* (*a*), which has been before noticed in considering the merger of powers (*b*).

And if the fee of lands be given to wife's separate use and *appointment*, there will be no merger.

The before mentioned agreements between husband and wife, respecting her power to dispose of her real estates, are merely of equitable jurisdiction, for being *executory*, neither they nor any executions of the powers intended to be given to her by them, convey *legal* titles. Since, therefore, a Court of law cannot intermeddle with equitable rights, there can be no redress for the appointees in that Court (*c*).

The proposition having been established, that whether real or personal estate be actually settled in trustees for the wife's separate use and disposal, or whether it rests merely in *agreement*, the trust or intent will be effectuated in equity with such qualifications as to the real estate as before distinguished; I shall next proceed to consider,

II. The wife's power of disposition over her real and personal estates in favour of volunteers, when such

(*a*) 1 Bos. and Pull. 193. (*b*) *Supra*, p. 102. (*c*) See Lord Kenyon's judgment in Doe v. Staple, 2 Term Rep. 695.

estates are merely limited to her separate use, and no express power of disposition is provided or given.

Difference between real and personal estate as to wife's power to appoint in the absence of express authority.

With respect to rents and profits of real estates, a gift of them to the wife for her separate use enables her to dispose of them as a *feme sole* (*a*), in the same manner as she may do of personal estate so limited to her; but in the following respect there is a difference between the two estates, for a limitation of real estate to the wife in fee to her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage otherwise than by fine or recovery, because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by the general law, and if she omit to do so, her heir will take the estate.

When a trust of personal estate is created for wife's separate use, she may dispose of the property without a special power,

With respect to personal estate, it has been settled since the case of *Fettiplace* v. *Gorges* (*b*), that when personal property is actually given or settled, or is agreed to be given or settled to the separate use of a married woman, she may dispose of it as a *feme sole* to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose.

In *Peacock* v. *Monk* (*c*), *Lord Hardwicke* said, "that where there is an *agreement* between husband and wife before marriage, that she shall have to her *separate* use either the whole or particular parts of her personal property, she may dispose of it by acts in her lifetime or by her will." But this observation applied to marriage contracts only to which the husband was a party; the general proposition applicable to all cases

(*a*) Hulme v. Tenant, 1 Bro. C. C. 16. (*b*) 1 Ves. jun. 46. 3 Bro. C. C. 8, S. C. and stated in the next page. (*c*) 2 Ves. sen. 191.

was that which was determined in *Fettiplace* v. *Gorges*. The principle upon which that decision was founded is this; that when once the wife is permitted to take personal property to her separate use as a *feme sole*, she must so take it with all its privileges and incidents, one of which is the *jus disponendi*.

The case last referred to was to this effect. The husband, being embarrassed and obliged to go abroad, conveyed all his estates in trust to pay his debts, and an annuity of 200*l*. to the separate use of his wife, and not to be subject to his debts or control. She was also intitled to 1000*l*. stock under the will of *A*, bequeathed in trust for *her sole and separate use*. After the wife's death, a writing signed by her was found, by which she left all her personal estate and every thing belonging to her to *B*. The husband, being the survivor, claimed two sums of 1000*l*. and 1900*l*. stock, which were found at her death, in the names of trustees for her sole and separate use. But *Lord Thurlow* dismissed the bill upon the principle before stated.

That case was followed by *Rich* v. *Cockell* (*a*). There 500*l*., three *per cent*. consols, were, by the will of *A*, vested in trustees, in "trust, to pay, transfer, and dispose of the same, and every part of the fund, and also of the dividends, &c. for the *sole and separate use* and benefit of her daughter *B*, the wife of *C*, as she should direct or appoint," with a direction that *B*'s receipt should, notwithstanding the marriage, be a good discharge to the trustees, in the payment or disposal thereof according to her free will and pleasure. The husband obtained a transfer of the stock. *B*, his wife, made a will disposing of 400*l*., part of the stock, for a transfer of which the suit was instituted by the legatee against the husband; and *Lord Eldon* decreed accordingly, observing, that the first will only expressed

(*a*) 9 Ves. 369. See also Wagstaff v. Smith, 9 Ves. 520.

a trust for the wife's separate use, not determining as to the power of disposition, whether by deed, or will, or other writing, but that the nature of her interest was settled, viz. that the trust being for her *separate use*, she was enabled to dispose of it by will as an incident to such interest, or she might have a power to dispose by an instrument not amounting to a will supported in that Court as a direction or appointment.

and without regard to the circumstance whether the property be in possession or *reversion*.

Although doubts have been entertained as to the power of the husband, with his wife's consent, to pass her interest in *reversion* which might by possibility fall into possession during the marriage, as has been before noticed and considered (*a*); yet there is no doubt but that she may dispose of such an interest *in presenti* when it is settled to her *separate use*, and thereby become her *sole property*.

Thus in *Sturgis* v. *Corp* (*b*), money in the funds, in which *A* had a life-interest, was vested in trustees, in trust, after the death of *A*, to pay the dividends into the proper hands of *B*, for her *sole and separate use* for life, whose receipts should be good discharges; and after her death the capital was given to *C*. *D*, the husband of *B*, purchased *C*'s interest, and then *B* and *D* sold by auction their reversionary interests, *A* being still living. The purchaser, before he would complete his contract, required *B*'s consent in Court for the passing of her reversionary estate for life. And *Sir William Grant* said, that where property was settled to the separate use of a married woman, her examination was unnecessary. That if the principle was, that the wife is, as to that property, a feme sole, and has a disposing power as such, then *B* had as much a disposing power over her *reversionary* interest as over her interest in possession (*c*).

(*a*) *Ante*, vol. 1. p. 238. (*b*) 13 Ves. 190. (*c*) See also Headen v. Rosher, Exch. Reports by M'Cleland and Yonge, vol. i. p. 89.

A case must be noticed, which cannot be reconciled with those above stated, nor with the principle upon which they are founded. That case is *Whistler* v. *Newman* (*a*).

Upon the marriage of *Mrs. Newman*, 1200*l.*, 3½ *per cent.* bank annuities (her property) were vested in trustees, in trust to pay the dividends into her hands for life, for her sole and separate use, and which were not to be liable to her husband's debts, &c. Her receipt too was declared to be a good discharge. The trustees sold the stock at the request of *Mr.* and *Mrs. Newman*, and paid to him, with *her consent*, the proceeds. He afterwards became insolvent, and died. The trustees then replaced the stock; and the question, so far as concerned the widow, was, whether, as the fund had been sold at her instance and request, she did not dispose of the dividends to which she was intitled to her separate use for life in favour of her husband? *Lord Rosslyn* decided in the negative, and that she was intitled to the dividends which had accrued since her husband's death. His Lordship's reasons were, because this case differed from the others on the subject that it was between the widow and her trustees, and not between her and her separate creditors, and that it was a breach of trust in her trustees to pay, even with her consent, the dividends to the husband.

The observations which occur upon the last decision are these: first, that the wife being to be considered a feme sole as to her separate estate, and having the unlimited power of disposition over it, might give it to whom she pleased, including her husband. The dividends, therefore, were in this instance, upon the principle of the case of *Fettiplace* v. *Gorges*, and the other cases, effectually given by the wife to her husband; and secondly, if she had such unlimited power of disposition, as is clearly established by those cases, and if

(*a*) 4 Ves. 129. See Mores v. Huish, 5 Ves. 692.

she might, independently of her trustees, and without their concurrence, have given the dividends to her husband, as is also established in the cases of *Grigby* v. *Cox* (*a*), *Pybus* v. *Smith* (*b*), and *Essex* v. *Atkins* (*c*), their having acted in compliance with her request could not with justice be considered a breach of their trust or duty towards her. It is conceived, therefore, that this case is not now of any authority.

III. It is observable that in the cases before considered, no particular mode of disposition was prescribed for the wife to dispose of the personal funds settled to her separate use, consequently any appointment of them in writing was sufficient; we shall, therefore, proceed in the next place to consider those cases, which, besides limiting the property to the wife's separate use, expressly give her a power of appointment by *deed or will.*

Of the requisite instrument to execute a power to appoint by deed or will generally.

When a deed is required by the power, it must be a perfect deed, it must consequently be under seal and delivered, for a writing without a seal and delivery is not a legal deed (*d*). In regard to *personal* estate, a will, established to be such in the Ecclesiastical Court, will be a good appointment of it. But as to *real* estate, it seems to be settled that it must be such a will as is sufficient to pass freehold lands, *i. e.* duly attested by three witnesses, as required by the statute of frauds. This, however, has been disputed; but if, when a deed is required by the power, a technical one be necessary, the same reason equally demands a will to be effectual to pass freehold estates when the power generally authorises an execution by such an instrument; a writing, therefore, in the one case, and a will not duly attested in the other, would not, as it is presumed, be a good execution of the power (*e*).

(*a*) 1 Ves. sen. 518. (*b*) 1 Ves. jun. 193. (*c*) 14 Ves. 547. (*d*) 2 Term Rep. 695. (*e*) See Wilkie v. Holmes, 9 Mod. 485, and Sugden on Powers, pp. 120. 208. 232. 3d ed.

Thus in *Longford* v. *Eyre* (*a*), *A*, upon her marriage, conveyed her real estates to trustees to such uses, &c. as she should by deed or will, or by any writing in the nature of a will, appoint. *A* executed a will in the presence of four witnesses, the regular attestation of which having been disputed without success, *Lord Macclesfield* said he much doubted whether the will would have been a good appointment had it not been executed according to the statute of frauds, because, added his Lordship, "when a power is given to appoint the uses of land by deed or will, the will must be intended such a one as is proper for the disposition of land, consequently subscribed by three witnesses in the presence of the testator; for the case is within all the inconveniences which the statute of frauds intended to prevent, and the other words, *in the nature of a will*, mean the same as a will, which must, therefore, be subscribed by witnesses in the presence of the testator."

A writing in the nature of a will.

Such was the deliberate opinion of *Lord Macclesfield*, which appears to have been acted upon by *Lord Thurlow* in *Duff* v. *Dalzell* (*b*).

In that case *A* bequeathed to his daughter, *B*, several shares in the *Sun Fire-Office*, and after her death "to such persons as she by will should direct." *A* also devised a moiety of his real and personal estates to *B* for life, remainder "to such person as *B* by will should direct." *B*, by will executed in the presence of two witnesses only, bequeathed the *Sun Fire shares*, and devised the moiety of the real estates. It was contended that the power was ill executed, at least as to the lands, because the will was not executed according to the statute of frauds. This objection seems to have prevailed with the Court, for *Lord Thurlow* said that

(*a*) 1 P. Will. 740. Wagstaff v. Wagstaff, 2 P. W. 258.
(*b*) 1 Bro. C. C. 147.

the will, being sufficient to pass the *personal* estate, seemed a good execution of the power *so far*.

A power requiring to be executed by a *deed* is ill executed by a *will*, et sic vice versa.

If the power require an appointment by *deed*, it cannot be executed by a will, because a will does not answer the description of a deed (*a*); also if the instrument be a *will*, the power will be ill executed by a deed (*b*). But if the power be more extensive, and contain the additional words "or by any *writing*, &c." that circumstance will authorise an appointment by *will* as well as by deed (*c*).

What evidence sufficient to prove will of wife made under a power.

To establish in evidence the will of a married woman made in execution of a power, probate of it in the Ecclesiastical Court is first necessary, in order to confirm judicially its testamentary nature (*d*). But the

(*a*) Earl of Darlington v. Pulteney, Cowp. 260. Doe v. Lady Cavan, 5 Term Rep. 567. Bushell v. Bushell, 1 Scho. and Lefroy, 90. (*b*) Reid v. Shergold, 10 Ves. 370, and Anderson v. Dawson, 15 Ves. 532, after stated. (*c*) Kibbet v. Lee, Hob. 312. Tylle v. Pierce, Cro. Car. 376. Roscommon v. Fowke, 6 Bro. Parl. Ca. 158. See Edwards v. Edwards, 3 Madd. 197. This subject is more fully discussed *infra*.

(*d*) According to the former practice of the Ecclesiastical Courts, a testamentary appointment of personal property by a feme covert, though made under a power given by the husband, was not admitted to probate without his concurrence. But the appointment was nevertheless carried into execution in equity, and when the husband had agreed by covenant, or bond, to permit his wife to dispose of property by will, he was liable to be sued at law for refusing his consent. See Vin. Ab. Baron and Feme, R. *a*. 4 Burn. Eccl. Law, 53. Daniel v. Goodwin, Sugd. Powers. App. 11. It is however now settled, that such an appointment cannot be made available, either at law or in equity, without probate. Ross v. Ewer, 1 Atk. 160. Stone v. Forsyth, Dougl. 681. Jenkins v. Whitehouse, 1 Burr. 54. Rich v. Cockell, 9 Ves. 369. And the appointment is now allowed to be proved without the husband's consent, the probate being limited to the property comprised in the power. See Tappenden v. Walsh, 1 Phill. 352. Moss v. Brander, ibid. 254. In these cases the Ecclesiastical Courts will not look nicely into the question whether the appointment is authorized by the power, as the grant of probate does not determine the right, but leaves it open for the decision of the temporal Courts. 1 Phill. 353.

production of such a probate will not alone be sufficient to induce a Court of Equity to act upon it; for there are other special circumstances which may be required to give the instrument effect as a valid appointment, viz. attestation, sealing, &c. with which circumstances the temporal Courts have not trusted the judgment of the spiritual Court. The witnesses, therefore, to these facts, must be examined in chief to prove that the will was the wife's act, &c.; and if an attestation be not required by the power, still her signature must be proved (*a*).

We have now arrived at that description of powers which, after specifying the instruments by which they are to be executed, require in addition particular ceremonies and acts to be observed in order to authenticate them, or to be as guards against fraud or surprise. Although these ceremonies may be perfectly arbitrary and unnecessary in relation to the legal validity of the instruments, yet as the donor or creator of the power is authorised by law to prescribe what terms he pleases to the effectual disposition of his property by the donee, such terms are as laws, and they must be strictly, literally, and precisely performed and obeyed, in order to a legal execution of the power.

All the formalities prescribed by a power must be attended to in its execution.

The power sometimes requires the *sealing* of the instrument only, and at other times the consent of two or more persons. What relates to these two subjects has been in part mentioned under the title of Husband and Wife's power of leasing (*b*); and in addition to what is there stated in regard to the necessity of actually fixing a seal, it must be observed that notwithstanding the case of *Strange* v. *Barnard* (*c*), which, as reported, seems to be to the contrary, it is presumed that consistently with common sense neither the circumstance of the paper being *stamped*, upon which the will in

(*a*) Rich v. Cockell, 9 Ves. 376. (*b*) *Ante*, vol. i. p. 117.
(*c*) 2 Bro. C. C. 585.

that case was written, nor that of the annexation of the sheets of paper by a *wafer*, as there also happened, can be equivalent to or dispense with the necessity of a seal; first, because sealing by such acts as these never was the intention either of the donor or donee; and secondly, because such a method of sealing is out of all practice and ordinary conception, and is destitute of that solemnity and effect belonging to an instrument under actual seal.

When the power requires actual signing or sealing, and the wife is from bodily infirmity prevented from performing either of these acts, it should seem that as the law does not require impossibilities, a performance *cy pres* must be of necessity admitted.

Thus a mark instead of a name may probably be deemed sufficient in analogy to the signing of a will in that manner under the statute of frauds, which requires the testator's signature (*a*).

So also guiding the hand in signing and sealing may be considered a compliance with the terms of the power, upon the application of the maxim, *qui facit per alium facit per se*, but it should seem that this agency should be at the request of the wife executing the power.

As to sealing including signing, *et è converso.*

But signing will not include sealing, nor sealing include signing, as has been settled by modern authorities, in contradiction to those of earlier date (*b*). The reason for it ever having been decided in the case of wills that sealing included signing, is explained by *Lord Eldon* in *Wright* v. *Wakeford* (*c*), thus, "when it was urged that the legislature meant more than sealing; first, from the circumstance that sealing is not mentioned as to wills; secondly, that the legislature must have proposed some evidence from the hand-writing of the party, the objection was, that a

(*a*) 29 Car. II. chap. 3, sect. 5. Harrison v. Harrison, 8 Ves. 185. Addy v. Grix, ibid. 504. (*b*) Lemayne v. Stanley, 3 Lev. 1. Cook v. Parsons, Pre. Ch. 184. (*c*) 17 Ves. 459.

person may sign by his mark, an act affording no material testimony; upon such reasoning, therefore, it was decided originally that sealing was signing." But in the case of *Lemayne* v. *Stanley* (*a*), there is this curious reasoning of three of the four Judges. "The putting of the testator's *seal* had of itself been a sufficient *signing* within the statute, *for signum* is no more than a *mark*, and *sealing* is a sufficient *mark*, *ergo* (the syllogism being complete) sealing must be a *bonâ fide* signing." This subtlety, however, ill accorded with the statute, and could not long survive; *Lord Eldon*, therefore, proceeds correctly to state the alteration which was made. "But upon a review of that (reasoning) the contrary (doctrine) has been held for a long time, and so far is sealing from being equivalent to signing, that it is determined that sealing is not necessary, and that sealing without signing is not a sufficient execution of a *will*, the converse holding as to a deed, which cannot be without sealing and delivery. If signed it may be a writing, but if delivered it may be a good deed whether signed or not, and if it be to be executed under a power with signature and sealing, *both* are required."

A will not well executed by sealing without signing. Sealing and delivery essential only to a deed.

The reason why sealing is not necessary to a will made in pursuance of a *general* power of appointment is, because sealing is not essential to the instrument called a will. If, however, a seal be specially required by the power, a will without a seal will not be a good execution of it (*b*).

But if the power require a seal to the will it must be fixed.

What we have been discussing related first to powers requiring appointments to be made by deed or will generally, and secondly, when signing and sealing were additionally prescribed, but without any direction that either of those acts should be done in the presence of

As to attestations by witnesses required by powers.

(*a*) 3 Lev. 1. (*b*) Dormer v. Thurland, 2 P. Will. 506. Ross v. Ewer, 3 Atk. 163.

witnesses or be attested by them. These two additional requisites will now be considered in their order.

When omission in attestation of appointor's signature in *presence* of the witnesses will *not* be fatal.

When the appointment is to be made in the *presence* of witnesses, and the power requires no attestation, if nevertheless the witnesses do attest in writing the execution of the instrument, and the attestation omit to state that the appointor executed the document in their presence, but the contents of the instrument declare that it was so signed, this omission will not vitiate the appointment, but it will be *presumed* from the declaration contained in the document that it was executed in the presence of the witnesses; and such a presumption does no violence to the power, since it does not require a written attestation to that fact.

Thus in *M'Queen* v. *Farquhar* (*a*) *A*, by his marriage settlement, had a power to appoint a considerable manor and estate in favour of the children of the marriage; "by any deed or deeds, writing or writings, to be by him *signed* and sealed in the *presence* of two or more witnesses, or by his will, &c." *A* by deed appointed this property to his eldest son, in which it was stated, that it was signed, sealed, and executed by *A* in the *presence* of three credible witnesses; but the witnesses subscribed a written attestation upon the deed to the sealing and delivery of it only, for which reason an objection was taken to the validity of the appointment. And *Lord Eldon* thus expressed himself. "Upon the question whether after execution it ought to be taken that *A* signed the deed in the presence of witnesses attesting the sealing and delivery, there would be a miscarriage in a judge directing a jury, if that fact were found, not to presume that the deed was *signed* in the presence of the same witnesses as it professed to be: that attestation therefore is good."

It is observable that the last case is no authority that

(*a*) 11 Ves. 468. 477.

if a power require the *attestation* of the witnesses to the signature, the attestation will be valid and support the deed, if it omit to express that the appointor signed the instrument in their presence. This determination, therefore, is quite consistent with the cases that will be presently adverted to, which have determined and settled that an appointment will be void at law under a power requiring the attestation of witnesses to the appointor's signature in their presence, if such attestation take no notice of that fact. That *Lord Eldon* considered his decision in the above case to extend no farther than as has been ascribed to it upon the facts disclosed, appears from his own criticism in the subsequent case of *Wright* v. *Wakeford* (*a*). His Lordship's comments upon *M'Queen* v. *Farquhar* were these. "The power actually exercised by the deed upon which the question arose was to be exercised in the presence of witnesses, but it was *not required expressly* to be *attested* by witnesses. The deed, said to be an execution of the power, was upon the face of it expressed to be executed in the presence of the witnesses, and so far from determining that attestation of the sealing was an attestation of the signing, I merely said, there would be a miscarriage in a judge if he did not direct the jury to presume that the deed was signed, as *it professed* to be on the face of it, in the presence of the witnesses who attested the sealing and delivery: a way of putting it that, so far from deciding, expressly avoided the question, whether attestation of the sealing and delivery is to be taken as attestation of the signing also."

When omission in attestation of appointor's signature will be fatal.

When the power requires the signing and sealing of the appointor to the instrument to be *attested* by witnesses, in that case if either (*b*) of these ceremonies be not noticed in the attestation, it will vitiate the ap-

(*a*) 17 Ves. 457. (*b*) 6 Taunt. Rep. C. P. 402.

pointment; for the terms of powers (as it has been before observed) are laws prescribed for the rule and guidance of the appointor, which must be literally and strictly pursued or obeyed, or the appointments will be void at law. The defect in the attestation cannot be remedied by the witnesses afterwards concurring and signing a *new* attestation, because the execution and the attestation of the instrument ought to be one transaction, completed at the same time, as is usual in the execution of all instruments that require attestation. Such, therefore, it is to be inferred to have been the intention of the donor of the power, and not an attestation to be made at a future period, which, if allowed, might be extended to any indefinite time after the transaction, and would be attended with great inconvenience.

The defect cannot be remedied by a subsequent attestation.

This question was settled in *Wright* v. *Wakeford*(*a*) upon a case sent out of Chancery to the Court of Common Pleas. The power was that "*A* and *B* and the survivor and his heirs, &c. might with the consent and approbation of *D* and *E*, or the survivor, testified by any writing or writings under their and his hands and seals or hand and seal, *attested* by two or more witnesses, sell and convey, &c." The power having been exercised in the presence of two witnesses, the memorandum of attestation upon the deeds merely stated the *sealing and delivery*, and was silent as to the signing. The defect was attempted to be remedied after the death of *A*, the appointor, (who had survived *B*) by the witnesses signing another memorandum upon the deeds, which expressly stated that the instruments were *signed*, as well as sealed and delivered, by the several parties in the presence of the witnesses. But the Judges (except *Mansfield*, C. J.) certified that the power was not at the first well executed from the silence of the

(*a*) 17 Ves. jun. 357. 4 Taunt. Rep. C. P. 213.

attestation as to the signature of the deeds in the presence of the witnesses, and that the *subsequent* attestation did not remove the objection, for the reasons before given.

The last case was approved of by the Court of King's Bench in *Doe* v. *Peach* (*a*). There the premises in question were settled to such uses, &c. as *B* and *C* should, during their joint lives, "by any deed or writing, deeds or writings, under both their hands and seals, to be by them duly executed in the presence of, and to be *attested* by two or more credible witnesses, from time to time appoint." This power was in fact executed by *B* and *C* as required, but the attestation by the witnesses was defective in this, that it expressed only the sealing and delivery of the deed of appointment, omitting altogether the signing of the instrument by the appointors. To remedy this omission, the same witnesses after the death of *one* of the appointors subscribed a new attestation upon the deed, expressing that such deed was signed as well as sealed and delivered by *B* and *C* in the presence of the witnesses. In order to distinguish this case from the last, it was contended for the appointee, that, as the power was worded, the deed might be duly executed in the presence of two witnesses, without the parties putting their hands and seals to it in the presence of such witnesses, so that the attestation might be good without its being extended to the *signing* of the parties; but this sublety was deservedly rejected by the Court, which said, that to make a due execution of the power there must be the making of an instrument with all the forms required by the power, and that there must be an *attestation* of its execution with *all* those forms; and that the intention of the parties was, that the *attestation* should be *co-extensive* with the things required to be

(*a*) 2 Maule and Selw. 576.

done, which brought the present within the last case, and the Court expressly denied that it was a legal consequence that the attestation of the sealing and delivery of a deed was an attestation of the signing of it. The determination was against the validity of the appointment, and the Court was of opinion, that the omission in the original attestation was not supplied by the second, made after the death of one of the parties.

The Court of *King's Bench*, in the late case of *Wright* v. *Barlow* (*a*), persevered in the doctrine laid down in the two last cases, which it is presumed may be considered to be now settled as before mentioned.

The last case which has occurred upon the present subject is *Doe* v. *Pierce* (*b*), in which a manor and lands were limited, after the deaths of *A* and *B* his wife, to the use of their children, as *A* "should by any deed or deeds, writing or writings, under his hand and *seal*, and *attested* by two or more credible witnesses, direct or appoint." *A* exercised his power by will, which purported to have been signed and sealed by him in the presence of three witnesses, but the memorandum signed by them merely attested the *signing* of the instrument. At the trial of the cause *C*, one of the subscribing witnesses, was produced, who proved his own signature to the attestation, and the signatures of the other attesting witnesses, and said, he believed that the seal was affixed to the will at the time of the execution of that instrument by *A*, and of the attestation of the witnesses. But *Gibbs*, C. J., determined against the validity of the appointment, observing that it was impossible to distinguish the case from that of *Wright* v. *Wakeford* (*c*).

(*a*) 3 Maule and Selw. 512. (*b*) 6 Taunt. 402.

(*c*) For similar reasons, it has been held that when the power is to be exercised by a will to be signed and published in the presence of and attested by two or more witnesses, the attestation must express

Although his Lordship said nothing upon the admissibility of the *parol* evidence which had been produced in the cause, or of its effects if admitted, these questions were discussed at the bar; and it was contended that the defect in the attestation could not be supplied by evidence *dehors* the instrument; for if it might, then the consequence would be, that the title would be good during the lives of the witnesses, and it would be defective upon their deaths.

As to the admissibility of parol evidence in these cases.

The admissibility of parol evidence in these cases may probably depend upon the following circumstances:—

1. If the power merely require the signing and sealing of the appointor in the *presence* of witnesses, since an attestation is not a requisite of such power, and consequently there is no necessity for the subscription of any such by the witnesses to give validity to the appointment; it is presumed that parol testimony of the signing and sealing of the instrument by the appointor in their presence is admissible. So also, when the witnesses happen to attest the sealing or signing of the appointment made under such a power, if they omit to notice either of those acts as having been done in their presence, it is conceived that the defect may be supplied by parol evidence, or presumed by a jury. In *Wright* v. *Wakeford* (*a*), *Lord Eldon* expressed an opinion to the following effect: "that if a signature were actually found at the bottom of the deed, and the jury would find that act as done in the presence of witnesses, he would not say that would not do. But that if attestation at the time were required, it could not be presumed where there was no signature, although the

that the instrument was published as well as signed in the presence of the witnesses. Moodie v. Reid, 7 Taunt. 355. 1 Madd. 516. Stanhope v. Keir, 2 Sim. and Stu. 37.

(*a*) 17 Ves. 459.

signature which was there might be presumed to have been in the presence of witnesses, yet not appearing to be so" from the attestation; and upon this principle and the statement in the appointment, the case of *M'Queen* v. *Farquhar* (*a*) appears to have been determined.

2. But if the power require that the solemnities of signing and sealing the instrument by the appointor should not only be in the presence of, but *attested* by the witnesses, then if they omit to make such attestation in writing at the time of the appointment, or having made one, they neglect to notice in it either the signing or sealing of the instrument by the appointor, parol evidence to prove either the one or the other cannot be admitted. With this agree the foregoing cases of *Wright* v. *Wakeford* (*b*), *Doe* v. *Peach* (*c*), *Wright* v. *Barlow* (*d*), and *Doe* v. *Pierce* (*e*).

Stat. 54 Geo. III. c. 168.

The statute 54 George III. (*f*), which remedies defects in attestations from omitting to notice the signature of appointors in the presence of the witnesses, has effect in retrospect only; its intention being merely to confirm preceding titles which had been approved by professional men under the mistake that *sealing* included *signing*, and that therefore an attestation expressive of the former included and attested the latter. It follows from the limited operation of the act, that since the thirtieth day of July, 1814, the day on which it passed, the omissions in attestations of signing or sealing by appointors, when the powers require those acts to be attested, will be equally fatal as they were prior to the statute.

(*a*) 11 Ves. 468—477, and stated *supra*, p. 192. (*b*) 4 Taunt. 213. (*c*) 2 Maule and Selw. 576. (*d*) 3 Maule and Selw. 512. (*e*) 6 Taunt. 402. (*f*) Chap. 168, passed the 30th of July, 1814.

CHAPTER XX.

EFFECTS OF THE WIFE'S *VOLUNTARY* GIFTS AND APPOINTMENTS OF HER SEPARATE ESTATE UNDER POWERS.

UNDER which title will be considered—

I. *The construction and different consequences of the wife's voluntary gifts and appointments in instances where she has a* mere power *to dispose of the capital, and when she takes the* absolute interest *in it. And*

II. *Instances where the wife must appoint according to the* terms *and* forms *of the power, in order to dispose of the property in favour of* volunteers; *also instances in which the execution of her power is unnecessary; and the wife's acts, regarding her separate property, in favour of her husband; and the effect of her acquiescence in his receipts of it.*

I. Having in the last chapter cleared the way to effectual executions of powers of appointment given to the wife, according to their terms and the ceremonies required by them, both in regard to the instruments, and to the proper attestations by the witnesses, when attestations are necessary, it will now be attempted to ascertain and point out when it will and when it will not be *necessary* for the wife to execute the powers so given to her; but the result of these inquiries depends upon the distinction, when, from the effect of the gift or limitation of the property to her, she takes an estate for life only to her separate use, with a power to dispose of the capital, and when (although the fund be *apparently*

given to her so as merely to authorise her power over it by appointment) the limitation will amount to a gift of the absolute interest in the property without the necessity of executing such power. It is, therefore, necessary to ascertain when the limitation merely gives to the wife a partial interest with a power of appointing the capital, and when the limitation, although in the *form* of a power, nevertheless gives to her the absolute interest.

When wife takes for life only, with a power to appoint.

1. It is settled that where there is an express limitation *for life*, with a power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed, *primâ facie* at least, by will (*a*). If the party die, the interest ceases with the life, and no one can take by transmission of interest from that person, although he or she may have transmitted the property by an execution of the power.

(*a*) A distinction is to be noticed between those cases, where after a limitation to a party for life, with a power of appointment, the principal is limited, in default of appointment, to the same party or to his or her representatives, and those in which, in default of appointment, the principal is limited or results to other persons. In cases of the latter class the donee has not the absolute interest: if the power be not exercised, the limitation in default of appointment takes effect and vests the principal in others: it can therefore only be disposed of by virtue of the power. Bradley v. Westcott, Croft v. Slee, O'Keate v. Calthorpe, Reid v. Shergold, and Anderson v. Dawson, cited *post*. are cases of this kind. In cases of the former class the donee has the entire beneficial interest in the principal, and consequently (if not under disability) may dispose of it independently of the power, by virtue of the general right of alienation which is incident to property. But if the donee be a *feme covert*, her absolute right to the property does not carry with it a general right of alienation, unless the property be given to her separate use. If the principal be in effect given generally to her separate use, she has an unqualified power of disposition: if not, it seems that she can only dispose of it by means of the power. See further on this subject, Heatley v. Thomas, Sockett v. Wray, and Lee v. Muggeridge, cited *post*.

The principle is this, that a partial interest having been *expressly* given, it will not be permitted, contrary to the intention expressly declared, to be enlarged by implication.

Thus *A*, being seised in fee, devised his lands to his wife *for life*, with a direction or power to give the same after her death to whom she would: the Court held that she had an estate for life only, with a power of disposition (*a*).

And in *Bradly* v. *Westcott* (*b*), *A* bequeathed to his wife, *B*, all his personal estate to her sole use for *life*, to be at her absolute disposal during that period, and after her death he gave such of his wife's jewels, &c. household furniture, and plate, of which she should be possessed at her death, with 500*l*., as she should by will appoint, and in default of appointment the same were to be considered as parts of his residuary estate. And *Sir William Grant*, M. R. decided that the wife took an estate *for life only* in the *whole* with a power of appointment: his Honor justly observing that, since the testator had given to his wife in *express* terms an interest *for life*, he could not, under the ambiguous words afterwards thrown in, extend that interest to the absolute property; which words he must construe with reference to the express interest for life previously given, viz. that she was to have as full, free, and absolute disposition as a tenant for life could have (*c*).

2. The express gift of an estate for life being the ground and principle, as before noticed, why the general power of disposition over the fund limited to the tenant for life prevents such interest from merging, and vesting absolutely in him or her the property to

When wife takes the absolute interest although it be limited to her in the *form* of a power.

(*a*) Anon. 3 Leon. 71. (*b*) 13 Ves. 445, 451. (*c*) See Tomlinson v. Dighton, 1 P. Will. 149. Nannock v. Horton, 7 Ves. 392, 394, 398. Reid v. Shergold, 10 Ves. 370. Anderson v. Dawson, 15 Ves. 532.

which such power of disposal is attached, it seems to be a necessary consequence that if no preceding express life estate be given to the donee of such a power, the absolute interest will pass by it. Suppose, then, the fund to be given to the wife, to be "at her sole and separate disposal," or to be disposed of by her "by will or deed," notwithstanding coverture (*a*); the absolute interest will vest in her, which she may dispose of as a feme sole under her *general* power to do so, and without any of the ceremonies required by the special power provided for her.

She may in those cases dispose of the fund without the aid of the special power.

Accordingly, in *Elton* v. *Shephard* (*b*), *A* bequeathed to trustees 2000*l*., "in trust to pay the *interest* to her daughter *B*, the wife of *C*, for her own sole and separate use, and she authorised, empowered, and appointed *B* to give and dispose of the 2000*l*. as *B* should by any will or writing under her hand direct and appoint." And the Master of the Rolls was of opinion that the first words, "in trust to pay the *interest* to *B* for her separate use," being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment were merely an anxious expression of the testatrix's intention that *B* should have an uncontrolled power of disposing of the fund. He, therefore, declared that *B* was absolutely intitled to the 2000*l*.

There is a species of limitations (very similar to those of the first class in which the wife takes only an estate for life, with a *power* of appointment) which without minute attention are likely not only to mislead a student, but also the practitioner, since such limitations have been decided not to fall within such first class.

(*a*) Robinson v. Dusgate, 2 Vern. 181. Maskelyne v. Maskelyne, Ambl. 750. Phillips v. Chamberlaine, 4 Ves. 51, 58. Hixon v. Oliver, 13 Ves. 108. (*b*) 1 Bro. C. C. 532.

The principle is, that it was the testator's intention that the wife should have the property absolutely, qualified and guarded only during the coverture in respect of her situation as a married woman, and to prevent the fund upon her death becoming the property of her husband as her administrator, in the event of his being the survivor. Of this class the case last stated may be considered one.

In *Hales* v. *Margerum* (*a*), *A* gave to his executors 1000*l.*, in trust *for the sole and separate use and benefit of his daughter B*, and not to be liable to the debts, &c. of her then present or any future husband; and that all *interest* which should become due after the testator's death should be paid to *B* for her own separate use and benefit only, whose receipt, notwithstanding coverture, should be a good discharge; that whenever *B* died the 1000*l.* should be absolutely in her own *power* to dispose of by her will, or any deed or writing purporting to be her last will, to any person or persons, &c. notwithstanding her coverture, at her death or any other restriction. But in default of any such disposition or appointment, then the 1000*l.* should belong to the testator's grand-daughter *C.* *Lord Alvanley*, M. R., held that *B*, under the above limitation, took an absolute interest in the 1000*l.*, and that it passed by her will as her *own* property, and not under the power (*b*). Upon this case it is observable that the first trust declared of the money was absolute in favour of the wife for her separate use, and that the subsequent qualifications were merely added in consideration of her then state of coverture, and were not intended to abridge the absolute interest first given to her. This distinguishes the present from the former cases.

(*a*) 3 Ves. 299.

(*b*) The Court, in holding that the daughter took the absolute property, seems to have disregarded that part of the will by which the fund was, in one event, given to the grand-daughter.

The case of *Heatley* v. *Thomas* (*a*) is similar in principle to the last, and arose upon a settlement by which the wife's legacy of 2000*l.*, and her annuity of 150*l.*, were vested in trustees upon trust for the sole and separate use and benefit of the wife *during* the then intended marriage between her and *B*, the *interest* of which was to be paid half-yearly during the coverture to the wife's proper hands for her sole use and benefit; and it was declared that she might *during* the marriage, by her *will* in writing, or any writing purporting to be her *will*, signed by her and attested by two or more credible witnesses, give or dispose of the 2000*l.* and the interest, to such person or persons, &c.; and that if she *died* before her husband, *B*, and without making any will or other disposition, then that upon her death before *B*, the same was to be divided according to the statute of distribution, in case she had died intestate and unmarried. The wife and her husband joined in a bond as a surety for *C*, who having become a bankrupt, the question was, whether the obligee could affect the wife's separate estate? And *Sir William Grant*, M. R., decided in the affirmative (*b*).

(*a*) 15 Ves. 597.

(*b*) The report of this case does not contain the grounds of the decision: but from the observations of Sir William Grant, on a subsequent occasion, it appears that he considered that the settlement in effect gave the principal to the wife's separate use generally. He stated that there was a declaration of trust as to the whole fund for the sole and separate use of the wife, not as to the interest only. The other directions he thought were rather consequential to this declaration than contradictory to it. There was not an express provision, that in the event of the wife surviving, the property should be absolutely hers; which would imply an exclusion of a power of so appointing it during the coverture, as that it should not, in that event, belong to her: and farther, it was to be collected from the whole instrument, that she was to have a power not only of appointing by will, but of disposing of the fund in any other manner. 1 Ves. and B. 123. The construction that the settlement was intended to

The reader will have noticed that the property settled was the wife's; that the first trust declared of it was for her separate use *absolutely* during the coverture, and that the special power of disposition and restrictions were merely added from the consideration of her situation as a married woman during the coverture; she, therefore, had absolute dominion over the property for her *separate use*, and then, as we have seen (*a*), such a dominion without any special power of disposition enabled her to *charge* or dispose of the fund absolutely as a *feme sole*, so that, without reference to the power, in this case she was at liberty to charge her separate estate, and having done so by bond, there was no objection to the payment of the debt out of such estate. This subject, however, will be afterwards more particularly considered.

Having shown when the limitation merely gives to the wife a *partial* interest, with a *power* of appointing the capital, and when the limitation, although in the *form* of a power, nevertheless gives to her the absolute interest for her separate use, without regard to the execution of such power, it is presumed that from attending to the distinct principles upon which these two classes of cases are founded, an apparent contradiction among them may probably be reconciled, i. e. with respect to some of them requiring the wife's appointment according to the precise terms of the power to dispose of or charge her separate estate, whilst others of them vest the absolute property of the funds in her, without the preliminary of any such appointment.

give her a power of appointing otherwise than by will, derived support from the part providing for the event of her dying without making any will *or other disposition*: but the above remarks do not entirely accord with the statement of the settlement contained in Vesey, according to which it was provided that the fund was to belong to the wife in the event of her surviving. 15 Ves. 598.

(*a*) *Ante*, page 182.

In order to show that, according to the above two principles or distinctions, all or the majority of the cases upon these subjects may be reconciled, and are properly decided, we shall proceed to consider,

When wife's appointment necessary in favour of volunteers.

II. The instances where the wife must execute her power according to its terms and forms, for the purpose of passing the property limited to her separate use, in favour of *volunteers*, and when such execution is unnecessary (*a*).

1. When (as in the first class of cases before stated and referred to) property is given or limited to the wife's separate use for life, with a power to dispose of the capital in a particular form, as by deed or will, her interest being for *life only in the income*, with an annexed power to dispose of the *capital*, the case falls within the law regulating the execution of such powers, which has been before mentioned. It seems, therefore, necessary for her to appoint by such instrument and with such ceremonies as are required by the power in order to pass the absolute interest in the property.

Thus, in the following case (*b*), *John Slee* bequeathed 500*l.* to trustees, to pay the *interest* to his wife for *life*, and after her death in trust, as to the *capital*, for such persons as she by deed or instrument in writing, executed as therein mentioned, should appoint; and the testator directed that the bequest should be void unless his wife released her dower within six months after his death, which she did not do. Under the circumstances of the case, *Lord Alvanley* decided that the power was not well executed by the will of the wife not referring to it; and said, that she had a mere *power* of disposition, and that had she, prior to her death (which was within six months after surviving her husband), released her dower and intitled herself to the 500*l.*, the

(*a*) With respect to *Creditors*, see next chapter. (*b*) Croft v. Slee, 4 Ves. 60, 64.

sum must have been placed at interest, and the dividends paid to her for life, after which event the capital would have been disposed of according to the *mode* pointed out by her *husband's will*, in case she had executed her power.

In that case, therefore, the Master of the Rolls had no doubt that the wife, in order to dispose of the principal money, could only do so by the execution of the power as directed by the will of the husband.

So also in *O'Keate* v. *Calthorpe* (*a*), *4099l. old South Sea annuities* and other funds, were transferred by marriage articles to trustees, in trust to permit the wife to receive the profits to her separate use, and if she survived, to transfer the whole to her; but if she died before her husband, then to transfer the property *according to her appointment*, by deed or will; and in default of appointment, to the issue, and if none, then to the husband and the wife's brother, in moieties. She made no appointment. Upon a bill praying that part of the funds might be applied as the wife should appoint, the Court said, that *if* she had any power over the principal, let her *make an appointment*, the effect of which would be considered; but till then the Court would not interfere.

It has been shown, upon a prior occasion (*b*), that if the wife had appointed as above suggested, the appointment would have had no effect upon the capital fund during the marriage, nor at its termination, except she died before her husband. The case, however, manifests what the Chancellor considered to be the law of the Court in the year 1739, when the decree was made, viz. that when the wife took for life, with an absolute power of appointment, the Court would not decide any thing in regard to the capital, except upon her appointment under the power.

(*a*) 8 Ves. 177. (*b*) Vol. i. p. 252, et seq.

point the principal after her death, and the ultimate limitation is to a *stranger*, or to *her next of kin*, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate if the power authorise a deed; but if it require the appointment to be made by *will* only, the disposition cannot take effect till after the appointor's death (*a*), and the wife is precluded from making an *immediate* disposal of the fund (*b*).

When the power confines the disposition to a *will*, the wife cannot make an irrevocable disposition.

Sockett v. *Wray* (*c*), determined by *Lord Alvanley*, is also an authority to the latter purpose; and although the decision has been disputed, yet it is conceived that the principle acknowledged in *Reid* v. *Shergold* and *Anderson* v. *Dawson*, before stated, supports the decree. The trusts declared in *Sockett* v. *Wray*, were that the trustees should from time to time during the life of *A*, the wife of *B*, pay the dividends of 1234*l. three per cent. consols*, into the proper hands of *A*, for her sole and separate use, and after her death, upon trust "to transfer the *capital* to such person or persons, at such time and times, in such parts, &c., and in such sort, manner, and form, subject to such powers, provisoes, conditions, restrictions, and limitations as *A*, by herself alone, whether sole or covert, and notwithstanding her then present coverture, during her life, by her last *will and testament*, in writing, or *any writing purporting to be her last will and testament*, to be by her signed and published in the presence of, and attested by two or more credible witnesses, should give, bequeath, direct, or appoint." The ultimate limitation in default of appointment was to *A*, her *executors* or *administrators*, for their own use and benefit. *Lord Alvanley* held that the wife could not by deed or other irrevocable act dispose of the *capital* fund, but only by

(*a*) *Ante*, page 186. (*b*) Doe v. Thorley, 10 East, 438
(*c*) 4 Bro. C. C. 483.

an ambulatory and revocable act, viz. by a will, or any instrument in the nature of a will (*a*).

The reader will have observed that the power does not authorise an appointment by any instrument except a will, or a writing purporting to be a will: this observation seems to obviate *Lord Eldon*'s criticism upon this case in *Sperling* v. *Rochfort* (*b*); for under the power the wife had no option to execute it by a revocable or an irrevocable act; the appointment was to be made by *will*, or by a *writing in the nature of a will*, and not by a deed, or by any writing which was immediate and irrevocable, but the instrument was to be one of which probate would be granted by the Ecclesiastical Court. Such, as above, was the ground of the decree, and as it is conceived, sufficiently solid to support it.

Semble, that appointment is necessary, whether the ultimate limitation in default of appointment be to wife's executors or administrators, or to her next of kin.

The reader's attention is requested to the circumstance, that in the cases before stated upon the present subject, with the exception of *Sockett* v. *Wray*, the ultimate limitation of the property, in default of the wife's appointment, was not to herself, but to a stranger, or to her next of kin; because it has been intimated

(*a*) In Richards v. Chambers, 10 Ves. 380, personal property was settled on the marriage, in trust for the sole and separate use of the wife for life; and if she survived her husband it was to be absolutely hers: if she died in his life, it was to go to such persons as she should by deed or will appoint: and in default of appointment to her executors or administrators. It was held by Sir W. Grant that she could not, during the coverture, make an absolute disposition of the principal. In Lee v. Muggerridge, 1 Ves. and B. 118, the marriage settlement contained similar limitations, excepting that the power of appointment was to be exercised by will: and it was decided by Sir W. Grant, that the wife could not during the coverture dispose of the principal, and consequently that a bond given by her in her husband's lifetime, did not bind the property after his death. In these cases the power did not authorise an immediate disposition, and the property not being given to the wife's separate use generally, she could not effect the principal, except by virtue of the power. Vide *ante* 200 and 204, *in notis*.

(*b*) 8 Ves. 176.

in some of those cases, that although an express estate be given to the wife's separate use for *life*, with a power to dispose of the principal, yet, if in default of appointment, such principal be limited to her *executors* or *administrators*, and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. The principle of the distinction is this; that in the first case the wife is to be considered complete mistress or owner of the property, the effect of such limitation being compared to that of a limitation to her right heirs, which, in the instance of real estates, vests the absolute inheritance; but that in the second case, the limitation to the wife's *next of kin* being the same in effect as that to *particular* heirs, which, if the subject were lands, would not pass the fee to a donee or devisee, will not therefore vest the absolute interest in personal estate in the wife, and consequently, that in order to dispose of the capital, the wife must have resort to her special power.

It is however submitted, that this analogy between real and personal estates is not applicable to the subject now under consideration; but that when the limitation in default of appointment is to the wife's *executors* or *administrators*, it will be required that she should execute her power in order to dispose of the fund during her marriage (*a*).

The reasons are these; admitting the limitation to impart to the wife the absolute interest in the fund, yet she being a married woman, the effect of such a limitation to her is quite different from a similar one to a man or to a *single* woman; for in the instance of such a limitation to a married woman who is under a legal incapacity to dispose of property during coverture,

(*a*) See vol. i. p. 254.

there is no repugnancy nor inconsistency between a limitation to her of the absolute interest, and a particular power of disposition over it during the marriage, as appears in a former part of this work relating to powers (*a*), and also under the title "*curtesy*," where it is shown that an equitable interest for the wife's *separate use for life* in real estate, and the ultimate limitation to her of the fee simple, do not unite in such a manner as to merge the particular estate and extinguish the special limitation to her separate use for life (*b*). The analogy, therefore, mentioned in the commencement of these observations, is inapplicable to limitations to married women, and it does not authorise the conclusion that when the wife has an estate to her separate use for life in personal property, with a power of appointment, and the absolute interest is limited to her if she do not execute the power, she has, in analogy to similar limitations of real estates at law, such an absolute estate as of necessity enables her to dispose of the property without regard to her special authority to do so. This necessity, therefore, not existing, and when the settlor's intention in giving such a power is considered, as also the anxiety of a Court of Equity to protect the wife's property against improvident dispositions of it from restraint, &c., during the marriage, it seems but reasonable that when an *express* estate *for life* in personalty is limited to her for her separate use, with a power of appointment, and in default of its execution to her, her *executors* or *administrators*, the same appointment should be considered necessary as has been decided to be so when the ultimate limitation in default of appointment is to her *next of kin* (*c*).

A case must be adverted to, in which *Sir Thomas* A *fortiori*, an appoint-

(*a*) *Supra*, p. 102, &c. (*b*) See vol. i. p. 22. (*c*) See Anderson v. Dawson, stated *supra*, p. 209.

ment is necessary when the executor or administrator takes by purchase, and not by representation.

Plumer (then Vice-Chancellor) held that a limitation of personal estate to a widow in her husband's will during life, with a power of appointment after her death, and in default of such disposition *to* her executors or administrators *for their own use and benefit* (*a*), did not vest the absolute interest in the widow, but that she had an estate for *life* only, with a power to dispose of the fund, upon the principle that the executors or administrators took as *purchasers* in their own rights, and not by representation.

An instance.

The case alluded to is *Sanders* v. *Frank* (*b*). *A* bequeathed to his wife *B* a leasehold estate for life, and he gave a moiety of it after her death to such person or persons, &c. as she should by *will duly executed* and *attested*, or by a codicil to her will appoint, and in default of appointment he gave the same moiety *to* the executors or administrators of *B* for *their own use and benefit*. *B* after surviving *A* made a will, which was neither signed, sealed, nor attested, and without an executor being named; but administration, with a copy of it annexed, was granted by the Ecclesiastical Court. The Vice-Chancellor, after declaring that the widow took such interest in the leasehold as before mentioned, said it had been observed that a gift of personal estate *to* a person, his executors or administrators, was equivalent to a gift to such person and his heirs of real estate, and that it was so because each disposition carried the whole interest; but that in this case the bequest being *to* the executors or administrators, *for their own use and benefit*, gave them the property beneficially, and not as trustees; that a gift *to* the heirs of *A B* of lands was no gift to *A B*, and by the same analogy a gift of personalty *to* the executors or

(*a*) In Sockett v. Wray, cited *supra*, the ultimate limitation was in the same terms. See Wellman v. Bowring, 1 Sim. and Stu. 24.

(*b*) 2 Mad. 147. 155.

administrators of *A B, for his and their own use and benefit*, was no gift to him. The decision was, that the will having been neither executed nor attested, was a void execution of the power, and that the property belonged to the widow's administrator by purchase, and not by representation.

From the authorities which have been stated, the distinction between mere power and property has been established; and it appears that it is necessary, in the first case, that the wife should execute her power, in order to pass the property to which such power applies; and that, in the second, no such necessity exists.

It must be remarked, that where an appointment by the wife is necessary, the trustees acting on her behalf need not to join as parties to it, unless their concurrence be expressly required by the power (*a*).

As to necessity of wife's appointment of her separate interest for life, when a *particular* power is prescribed.

What has been said in this section is confined to the powers of disposition by married women of the absolute interests in the *capitals* of the funds; but it sometimes happens, that a wife is only intitled for life to *interest* or *rent* of the property to her separate use; and it has been before noticed, that if no particular power to dispose of them be given, she may do so under her general power as a *feme sole* (*b*). It is also conceived, that such general power will not be suspended by any particular mode prescribed in the instrument limiting to her the property, upon the principle that the wife, having such a general power resulting from the estate for life given to her separate use (*c*), she may dispose of that interest under such general power (except she be restrained by express words from alienating by anticipation), or she may dis-

(*a*) 1 Ves. sen. 518. Essex v. Atkins, 14 Ves. 547, stated *infra*. Pybus v. Smith, 1 Ves. jun. 169. 193. (*b*) *Ante*, p. 181.
(*c*) And she has the same general disposing power over a reversionary interest given to her separate use. Sturgis v. Corp. 13 Ves. 190.

pose of it in the particular manner prescribed by the special power. Upon this principle, it would seem, *Sir William Grant* decided the case of *Chesslyn* v. *Smith*, after stated (*a*), and which principle appears to be the same as produced the decisions in *Elton* v. *Shepherd*, *Hales* v. *Margerum*, and *Heatley* v. *Thomas*, before stated and referred to (*b*).

If, therefore, the interest of a fund be directed to be paid as *A*, a married woman, should appoint by note or writing under her hand, and for want of such appointment then into her own hands for her separate use for life, it is conceived that *A* may dispose of it either by anticipation under her general power incident to her life estate, or by the particular mode prescribed by the special authority (*c*).

2. I must now observe, that although the wife be considered as a *feme sole* in regard to her separate estate, and is authorised so to deal with it, and may therefore appoint it to her husband (*d*), yet this doctrine seems to admit of qualification in regard to transactions with her husband relative to such property. This appears to have been *Lord Rosslyn*'s opinion in *Milnes* v. *Busk* (*e*), in which he refers to *Pawlet* v. *Delaval* (*f*), the only case he had been able to find where the question arose directly between husband and wife; and he ascribes the determination of it to particular circumstances, observing that it was clear from *Lord Hardwicke*'s reasoning, and the pains he took to collect all the circumstances, that his Lordship did not entertain an idea that in the *common case* of a married woman

(*a*) 8 Ves. 183, stated *infra*. (*b*) P. 202, *et seq.* (*c*) See Witts v. Dawkins, 12 Ves. 501. Brown v. Like, 14 Ves. 302; and Bullpin v. Clarke, 17 Ves. 365, stated *infra*. (*d*) 11 Ves. 222. And see the forms of wife's appointments by deed and will, in Append. No. 17 and 18. (*e*) 2 Ves. jun. 498. (*f*) 2 Ves. sen. 663.

having separate property she could to *all* intents and purposes be placed upon the same footing as a *feme sole*. The subject may, perhaps, be considered thus: In transactions between husband and wife, relative to the separate estate of the latter, she, *primâ facie*, will be viewed in the light of a *feme sole*, and as such be competent to dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part (*a*). To this effect *Lord Hardwicke* expressed himself in *Geigby* v. *Cox* (*b*), which is countenanced by what *Lord Rosslyn* said in *Milnes* v. *Busk* in regard to the practice of the Court of Chancery, viz. "that he had been informed it was *very constantly* the course of the Court, and particularly at the *Rolls* where these cases came on, that where the trustees oblige the party to apply to the Court, it had not established a deed between husband and wife upon her separate estate without her actual presence in Court (*c*)." Upon this declaration of *Lord Rosslyn* the Solicitor-General observed, that *Sir Thomas Sewell* had said, that if trustees would not take upon themselves to act, but compel the parties to file a bill, they cast their discretion upon the Court, which would not act for them without the presence of the wife. The presence, however, of the wife in Court, upon an appointment of her separate estate either to her husband or to strangers, is not necessary in order to pass her separate interest (*d*), since she is to be considered as a *feme sole*, with the like complete power of disposing of her property; but it seems that, when such transactions come before Courts of Equity, they will require the wife's presence, and (if necessary) direct inquiries into such transactions,

The Court will, if necessary, direct inquiries into the transaction.

(*a*) See Essex v. Atkins, 14 Ves. 542. (*b*) 1 Ves. sen. 518.
(*c*) Upon this subject see vol. i. p. 246. (*d*) Upon this point see Lord Elden's observation in Sterling v. Rochfort, 8 Ves. 182; also Sturgis v. Corp, 13 Ves. 190.

to ascertain their fairness, and the circumstances under which the wife was induced to concur in them (*a*), *Lord Thurlow*, in *Pybus* v. *Smith* (*b*), observing "it was very fit, in the case of a married woman, that the Court should know how she had disposed of her property."

When the Court will and will not supply wife's defective execution of power in favour of her husband.

3. With respect to defective appointments made by husband and wife to each other, there is this distinction, viz. that an imperfect appointment made by him to her will be good in equity (*c*), but a defective appointment made by her to him will not in general be remedied by that Court.

Accordingly, if the wife have a power under a will to appoint by an instrument signed by her, to be attested in the presence of two witnesses, and she appoint the fund to her husband by a writing attested by one witness only, the appointment will be void at law, and no relief can be obtained in equity.

In *Moodie* v. *Reid* (*d*), the Court said, that if the power were not well executed, it would not relieve the husband; that equity had already gone a great way in these cases, and had supplied defective executions of powers in favour of a wife, a child, a purchaser, and creditors, but not beyond these instances; and that if the Court were to go farther it would not know where to stop.

If, however, the appointment be made to the husband before, and in consideration of marriage, and in pursuance of a power previously given to the wife, in that case, if the execution of the power be defective, a Court of Equity will remedy the mistake; because the husband does not claim as a volunteer, but as a *purchaser*, under the marriage contract.

(*a*) Parkes v. White, 11 Ves. 231. (*b*) 1 Ves. jun. 194, stated *infra*. (*c*) Tollet v. Tollet, 2 P. Will. 489. (*d*) 1 Mad. 521. 2 Mad. 156. Watt v. Watt, 3 Ves. 244.

Thus, in *Sergeson* v. *Sealey* (*a*), *A*, by settlement upon a first marriage, was empowered to charge her own estate with 4000*l.*, for such persons as she should, by *deed* or *will* duly executed in the presence of three witnesses, appoint. *A* having this power and being about to marry *B*, a second husband, *declared* in articles of settlement, that *B* should raise 2000*l.* (part of the 4000*l.*) for his own use, and *B* covenanted to convey lands for securing the money, but in trust as to the rents for himself during his and *A*'s joint lives, and then to raise the 2000*l.* for the younger children of the marriage. The articles were executed by *A*, in the presence of *two* witnesses only; and the question was, whether they were a good execution of the power? *Lord Hardwicke* was of opinion in the affirmative, and said, that although it had been insisted that the articles were a defective execution of such power, because there were only two witnesses to them, yet the Court would supply that defect where the execution of a power was for a *valuable* consideration, much more where the execution was of a trust only; and that notwithstanding the appointment was in this case inaccurately expressed, and in an informal manner, yet it should amount to a *grant* of the 2000*l.* to *B*, and if so, then that *B* was intitled to have the whole use and benefit of the money during the marriage; that the case fell exactly within the reason of *Lady Coventry*'s (*b*), where a tenant for life, with a power to make a jointure, *covenanted* for a valuable consideration to execute his power, the Court would supply a defective or a non-execution of the power against the remainder-man.

It clearly appears that the last case was decided in favour of the husband, upon the principle of his being a purchaser. It therefore by no means authorises the general proposition, that a husband is intitled to the

(*a*) 2 Atk. 413. Ed. by *Sanders*. (*b*) 2 P. Will. 222.

same equity as a wife or child, in regard to having defective executions of powers supplied through the medium of a Court of Equity.

Wife's acts amounting to a *gift* of her separate property to her husband.

4. Since the wife may appoint and dispose of her separate property as a *feme sole*, so she may *give* it to, or permit her husband to receive it, which will preclude her right after his death to charge his estate with what he so received. This was acknowledged by *Lord Hardwicke* in *Pawlet* v. *Delaval* (*a*), in which case he decided, that *Lady Pawlet* having, during the joint lives of herself and husband, permitted him to call in, manage and dispose of her separate estate as his own, and after his death treated by acts such her separate property, as assets belonging to him, discharged the original limitation of it to her separate use, and gave it to her husband.

In *Smith* v. *Camelford* (*b*), the Court declared, that if the wife permitted her husband to receive the rents of her separate estate, he was not afterwards accountable to her for them. The same decision was pronounced in *Milnes* v. *Busk* (*c*), the wife having expressly empowered her husband to receive the rents of her separate estate during her life. *Powell* v. *Hankey* (*d*), is a case where a similar decree was pronounced upon her permission and acquiescence in her husband receiving the produce of her separate property; and in *Squire* v. *Dean* (*e*) the husband received the interest of his wife's separate estate, and applied it to the use of the family; her assent to the receipt and application was presumed, and she was not permitted to claim any thing on account of it out of her husband's assets.

Wife's rights upon husband's estate for his receipts of her separate property.

But if no such consent be given, nor can be presumed, instances of which have been produced in a

(*a*) 2 Ves. sen. 663. (*b*) 2 Ves. jun. 698. 716. (*c*) 2 Ves. jun. 488. (*d*) 2 P. Will. 82. (*e*) 4 Bro. C. C. 326.

preceding page (*a*), then the wife will be intitled to reimbursement out of her husband's estate for the whole of what he received of her separate property, as in *Parker* v. *Brooke* (*b*). Yet in an instance where she was supported by him, and insane, and he received her separate estate, for which his own property was liable to answer (because his wife, so circumstanced, could neither authorise nor consent to his taking her separate estate), still, in consideration of his maintaining her, he was allowed in discharge a proper sum for what he expended in her support. The instance alluded to occurred in the *Attorney-General* v. *Parnther* (*c*).

It cannot escape the observation of the reader that the principle which pervades the cases upon the subject is this; either *express* gift by the wife to her husband, or an *implied* gift to him (when it can be raised), of her separate estate, resulting from cohabitation and her acquiescence.

Upon this presumption it is, that if the wife without intermediate claim suffer her husband to receive the annual income of her separate estate, a Court of Equity will permit her, surviving him, to charge his assets in account with no more than the amount of one year's arrears, or for one year of his receipts preceding his death, according to some cases, and not even with one year's receipts or arrears according to others.

If notwithstanding the *dicta* in some of the cases, a distinction may be considered to exist between property settled to the wife's separate use *aliunde*, and pin-money settled upon her by her husband, all or the majority of the cases may probably be reconciled.

Probable distinction in regard to such rights between arrears of pin-money, and husband's receipts of wife's separate estate.

Thus, if the wife expressly or impliedly authorise her husband to receive the interest or rents of her general separate property during his life, this being a

(*a*) *Ante*, p. 133. (*b*) 9 Ves. 583, stated *infra*. (*c*) 3 Bro. C. C. 441. 4 Bro. C. C. 409.

gift, there can be no reason to give her any part of them which accrued during his life. With this agree the before mentioned cases of *Smith* v. *Camelford*, *Powell* v. *Hankey*, and *Squire* v. *Dean*; and also *Whistler* v. *Newman* (*a*), and *Dalbiac* v. *Dalbiac* (*b*), after stated. But when the property settled is that of the husband or the wife, and he is under contract to pay to her annually a certain sum as pin-money, considered to be for her *personal* use, and a provision by him, in such a case as it may be detrimental to her to carry implied acquiescence on her part to the extent of excluding her claim to this provision up to her husband's death, it does not seeem unreasonable that she should be allowed one year's arrears previous to that period, and so the Court has considered in the cases referred to below (*c*).

Effect of wife's consent in Court to divest herself of her *separate* property without an appointment.

5. As the gift or acquiescence of the wife will intitle her husband to her separate estate, so will her *consent*, given and recorded in a Court of Equity, have the same effect (subject to the distinctions after mentioned), whether such property be in the immediate possession or power of trustees, or in remainder or reversion (*d*).

The taking of the wife's consent to the passing of her personal estate, not settled to her separate use, has been mentioned in a prior part of this work (*e*); what remains to be said upon the subject of her assent applies to personal property which she is possessed of or intitled to for her *separate use*, over which she has the *jus disponendi generally* (*f*) as a *feme sole*, or a special power to appoint (*g*).

(*a*) 4 Ves. 146. (*b*) 16 Ves. 126. (*c*) Townshend v. Windham, 2 Ves. sen. 7. Peacock v. Monk, 2 Ves. sen. 190. Offley v. Offley, Pre. Ch. 26. See 11 Ves. 225, and 2 Madd. 286 *n*. (*d*) Sturgis v. Corp, 13 Ves. 190, stated *supra*, p. 184. (*e*) Vol. 1. p. 246. (*f*) See *supra*, p. 182.

(*g*) The wife's examination and consent in Court, is however entirely unnecessary with reference to separate property. See 13 Ves.

The principle upon which the Court acts in these instances is this, that the wife, being considered a *feme sole* as to the property, and having an absolute interest in it either in the whole or in part, may dispose of it as she pleases. Hence it follows that her appointment, when one is required, can only be dispensed with (as it has been observed (*a*)) when she takes such an absolute interest as before mentioned. If therefore she be possessed of an interest for *life* to her separate use, with a power of appointing the capital by deed or will, the Court will not, in the absence of appointment, order the property to be transferred either to herself or to her husband upon the authority of her consent (*b*). And although the limitation in default of appointment be to her, her *executors* or *administrators*, it will make no alteration in favour of the application, because such limitation does not vest in the wife the absolute interest

192. 3 Madd. 385. Hence, in Sturgis v. Corp, the decree was made without the wife's consent being taken, referring it to the Master to settle an assignment. Reg. Lib. B. 1806, fo. 108. And an assignment or appointment by the wife is the regular mode of passing her separate property: her consent in Court can be of no use, excepting that it may sometimes save the expense of a deed: and the Court has therefore latterly, in some instances, declined taking the consent.

It is in general said, that the wife's consent is only required for the purpose of waiving her equitable right to a provision out of her choses in action, not settled to her separate use. See 13 Ves. 192, 3 Madd. 385. But her consent in Court has sometimes a further effect, as in cases where it has been taken for the purpose of declaring her election. Where money is given on trust to be laid out in purchasing land, to be conveyed to a *feme covert*, she may, on an examination in Court, or before commissioners, elect to take it as money. Pearson v. Brereton, 3 Atk. 71, Binford v. Bawden, 1 Ves. jun. 512. If the land, when purchased, is to be settled upon her in tail, her election is made by a like examination, upon a petition under the statute, 39 & 40 Geo. 3. chap. 56.

(*a*) *Supra*, p. 200. (*b*) *Supra*, p. 206. See Anderson v. Dawson, 15 Ves. 532.

in the fund, as it has been shown (*a*). For the like reason, when the life interest of the wife to her separate use is so given as to restrict her power of disposition to the dividends to accrue *in futuro* (which it is conceived can be only done by express declaration that she shall not dispose of them by *anticipation* (*b*), or by special trust as to application when the provision is by the husband for his wife on separation, as in *Hyde* v. *Price* (*c*),) the Court will not act upon her consent to pass, surrender, or charge such her interest.

But when the wife takes an *absolute* interest in the funds qualified only during the coverture, on account of her condition as a married woman (instances of which have been before produced (*d*)), then it is presumed, that since she has in such cases complete dominion over the property, as if she were a single woman, without regard to such qualifications, the Court would order it either to be paid or transferred to herself or to her husband with her *consent*, without regarding the circumstance of no appointment having been made, although one of such qualifications gave her a power to make one, because the absolute interest having been given to her as a feme sole, she in that character is enabled to dispose of the funds independently of any special power.

Upon the same principle, if the wife be intitled to the *interest* of the fund for life to her separate use with a prescribed power to dispose of it, and upon her death the capital is given to her husband; in such case, if they file a bill in Chancery praying that the principal may be immediately paid to her husband, and she *consent* to part with her life estate, the Court will order the fund to be paid or transferred to him.

(*a*) *Ante*, page 211. (*b*) This restriction is considered *infra*. (*c*) 3 Ves. 437, and considered, *infra*. (*d*) Page 203.

Thus, in *Chesslyn* v. *Smith* (*a*), *A*, by deed, reciting that he was desirous of making a provision for *B*, his wife, during her life, directed the trustees named in it to invest 500*l.* in three *per cent. consols*, in trust to pay the interest during *A*'s life, in such manner as *B* should appoint by any note or writing under her hand, and notwithstanding her then marriage; but in default of such direction to pay the same into her hands for her sole and separate use; and after her death, if *A* survived her, upon trust for him, his executors and administrators; but if he died before her, then to pay the principal according to his appointment, and if he made none, then upon trust for himself, his executors, &c. The 500*l.* were invested by the trustees, against whom *A* and *B* filed a bill, praying a transfer to *A* for his own use and benefit, upon his giving to the trustees his personal security. *B* consented, and *Sir William Grant* decreed according to the prayer of the bill.

Instance of the trust fund being ordered to be paid to husband with wife's consent.

The reader will have observed that there is a particularity in the last trust; it is not limited, in the *first* place, to the wife's separate use for life, but it orders the interest to be applied as she shall direct by *note* or *writing* under her *hand*, and in default of such direction, then upon trust to pay it into her own hands, &c. But all this amounts to no more than a trust for the wife's separate use for life; and she having, as incident to such an estate, a power of disposing of it *ad libitum*, such power superseded the particular mode prescribed, so that the Court must have considered a compliance with it *in specie* unnecessary, and therefore no impediment to the relief which was prayed.

The like principle, which authorizes the Court to dispense with the wife's appointment, and to order,

(*a*) 8 Ves. 183. To the same effect see Clarke v. Pistor, cited 3 Bro. C. C. 568, and stated *infra*, p. 231, and Gullan v. Trimbey, 2 Jac. and Walk. 451, *n.*

with *her consent*, a transfer of her separate estate to her husband, will induce it, on the authority of the same consent, to order the funds to be applied in payment of his debts.

When upon the bill of husband and wife, and her consent, the Court will order her separate estate to be applied to pay his debts.

Thus, in *Allen* v. *Papworth* (*a*), *Lord Hardwicke* held, that if a married woman, having power to receive the profits of an estate to her separate use, and to appoint them as she pleased, filed a bill jointly with her husband for an account, and submitted that the profits should be applied in payment of *his debts*, and for which a decree was pronounced, such a bill, to which she was made a party without collusion, was as much an execution of her power, as an actual appointment would have been, and the profits would be bound by the decree.

Lord Hardwicke must be understood to have applied the expressions, that a decree upon the wife's consent (*b*) in a suit in which she and her husband were plaintiffs, was equivalent to an actual appointment by her, to a case where a married woman had such an interest in the property to her separate use as she could dispose of independently of any special power; for in such an instance her *consent* alone is sufficient to pass her separate interest, and such consent being given and

(*a*) 1 Ves. sen. 163.

(*b*) It does not appear that the wife consented to the decree. See Belt's Supplement, p. 88, where the substance of the pleadings is stated from the Registrar's Book, but it is difficult to collect from them what was the point decided. The opinion attributed to Lord Hardwicke that the bill might operate as an appointment, is (to say the least) very questionable, a bill filed by a husband and wife jointly being in effect the bill of the former. See 2 Ves. sen. 452. 666. 1 Sim. and Stu. 188. And though a power has been held to be executed by a declaration contained in an answer in Chancery, (Carter v. Carter, Mose, 369) it does not follow that the same effect is to be ascribed to the contents of a bill, which may be altered by amendment. In this case a decree had been pronounced, and therefore it did not rest upon the bill alone.

confirmed by decree, these two acts, his Lordship said, were equivalent to an actual appointment; such was the case of *Allen* v. *Papworth*. The wife took an estate for life to her separate use in the profits of lands, the law enabled her to dispose of them as a feme sole, she might therefore consent to part with them to the creditors of her husband (*a*). But when the wife takes no interest in the capital, but a power only to dispose of it, in such case (as it before appears (*b*)), nothing less than an actual appointment will be sufficient, and the Court will not act upon a bill filed by her and her husband without a previous appointment, because such a bill is considered as that of her husband only (*c*), and therefore incapable of amounting to the express and deliberate appointment of his wife (*d*).

(*a*) Chesslyn v. Smith, *supra*, p. 225. (*b*) *Ante*, p. 206. (*c*) 2 Ves. sen. 666. (*d*) 8 Ves. 177. And see vol. i. p. 252, *et seq.*

CHAPTER XXI.

RESTRAINT OF WIFE'S DISPOSING POWER BY ANTICIPATION; AND THE RIGHTS OF HER CREDITORS UPON HER SEPARATE ESTATE.

HAVING shown that a married woman may dispose as a feme sole of personal property settled to her separate use, whether it be in possession or reversion, it is proposed to consider in this chapter—

I. *What will be sufficient to restrain the power which the law imparts to the wife to dispose by anticipation of her separate estate as a feme sole.*
II. *The rights of her* general *creditors upon her separate estate.*
III. *The effect of her appointments to intitle* particular *creditors to a satisfaction of their demands out of her separate estate, including sales to purchasers.*
IV. *When she is intitled to be relieved against such her contracts.*
V. *As to her separate character in equity in regard to proceedings by or against her.*

I. In preceding parts of this treatise have been noticed some of the alterations which have been made in modern times in the wholesome rule of the common law; according to which rule a married woman was disabled from disposing of either real or personal estate during the marriage, with the exception of the former by fine, and of the latter with the privity and concurrence of her husband. But now the doctrine of the wife's disposing power as a feme sole forms, in a Court of Equity, one of its most extended and complicated systems.

It having been once established that a married woman might lose that character, and act at law by circuity through the intervention of trustees as a single woman, in regard to real or personal estate settled to her separate use and disposition, a Court of Equity, disengaged from legal forms, went further, and held that it would supply the omission of trustees, and raise a trust upon the apparent intention, so that whether there be trustees or no trustees appointed, a married woman is now competent at law or in equity (although contrary to the rules and principles of the general common law) to take and dispose of property limited to her separate use as a feme sole. The application of this doctrine to the various modifications of the rules of property has not only been the occasion of great expense and much litigation, but also of considerable perplexity and embarrassment, since many of those rules were found to be inconsistent with the subsisting relation between man and wife. These perplexities and difficulties were so severely felt, that the Judges, in the great case of *Marshal* v. *Rutton* (*a*), restored the common law to a certain extent. Previously to that case, Courts of law were rapidly advancing towards the establishment of the general proposition, that all the disabilities of the wife during the marriage, which the common law created for the wisest reasons, were completely merged in the new principle, that a wife was to be considered as a feme sole in regard to her separate property, for it was determined that she might contract so as to bind her person, might sue and be impleaded as a single woman, and might be taken in execution, &c. But the case referred to swept away all such consequences drawn from the above principle. The principle, however, still remains, and the consequences to be deduced from it in equity, in regard to the restraint of the wife's

As to restraint of wife's general power to dispose of her separate estate by *anticipation*.

(*a*) 8 Term Rep. 545.

general power of totally disposing of her separate estate, will be one of the subjects considered in this chapter. It must be noticed that much diversity of opinion prevailed in this matter; some persons contending that the wife's general power of alienation over her separate property might be restricted by the settlor's intention, *inferred* from the language of the instrument, whilst others insisted that nothing less than an *express declaration* that the wife should not have such a general power would have that effect. The latter opinion has been confirmed by modern authorities, as will be shown before we proceed to consider what has been determined to be insufficient to restrain such general power.

Express declaration that wife should not dispose by anticipation of her separate estate necessary to deprive her of that power.

Whether this restraint could be effected even by express negative words appears to have been originally doubted, upon the ground of its being repugnant to the interest which the wife took in the property, but in *Miss Watson's* settlement, in which *Lord Thurlow* was a trustee, the words, "and not by anticipation," were by his advice inserted, and *Lord Alvanley* thought the clause to be a good one, and it has been so considered ever since; and last of all by *Lord Eldon*, in the case of *Jackson* v. *Hobhouse* (*a*).

In that case 6000*l.* were vested in trustees to permit the wife to receive the interest for life to her separate use, &c. with a proviso against her assigning or otherwise disposing of such interest in any mode of anticipation. The husband and wife assigned the interest to secure an annuity to *B*, in which *C* joined as a surety. *C*, having been obliged to pay some arrears of the annuity, filed a bill against the trustees for reimbursement out of the wife's separate interest, and for the application of the residue in paying *C*'s annuity in future, and for an injunction to restrain the trustees from disposing of the 6000*l.* and interest. This in-

(*a*) 2 Meriv. 483.

junction having been obtained, *Lord Eldon*, upon a motion to dissolve it, said it was too late to contend against the validity of a clause in restraint of anticipation, and he dissolved the injunction. His Lordship also expressed an opinion that if the wife had been guilty of fraud by concealing the clause of restraint, the circumstance could not have improved the situation of the surety in enabling the wife to dispose of her separate interest contrary to the express declaration of the settlor.

The doubt which at first prevailed as to the validity of express declaration that the wife should not dispose of her separate interest by anticipation, affords strong evidence that nothing less will have that effect. And it has been frequently determined, that where the interest has been directed to be paid from *time to time* into the *proper* hands of the wife, such direction was insufficient to prevent her having an absolute disposing power over the income, before the arrival of the periods for her own proper receipts of it. In *Parkes* v. *White* (*a*), *Lord Eldon* considered it to be settled by the authorities, that all the words usually found in limitations to the separate uses of married women, as to pay the interest or rents into *their own hands*, and *from time to time*, &c. amounted to no more than gifts to their separate uses, leaving them at full liberty to dispose of the income as they pleased.

Direction to pay the interest limited to wife's separate use for life 'from time to time' to her or 'into her proper hands' will not prevent alienation.

The insufficiency of a direction to pay the interest or rents from time to time to or into the hands of the wife, to restrain her power of disposition by anticipation, will appear from the case next stated, and also from others which will be referred to.

In *Clarke* v. *Pistor* (*b*), decided at the Rolls in the year 1778, the trust was "to pay the dividends of 2000*l. bank stock* to such persons, &c. and in such

(*a*) 11 Ves. 222. (*b*) Stated 3 Bro. C. C. 568.

manner and form as the wife should from *time to time* during her life, notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment, into *her proper* hands for her separate use," &c. and after her death to transfer the capital to her husband. Upon the bill of the husband and wife against the trustees, she having made no appointment, the Court, with her consent, ordered a transfer of the fund.

The last case is an instance of the words "from time to time" not having the effect of restraining the wife's power of disposing of her estate limited to her separate use in the case of a *voluntary* gift made by her, but several of the decisions arose upon questions between her and her creditors, which will be afterwards detailed. These cases uniformly support her absolute right of alienation, notwithstanding the occurrence of the words "from time to time" in the direction of payment of the interest to her. The cases are *Pybus* v. *Smith* (*a*), *Witts* v. *Dawkins* (*b*), and *Brown* v. *Like* (*c*).

It was before observed, that express declaration that the wife should not dispose of her separate income, was presumed to be necessary in order to take away her general power of alienation over it, and which proposition, it is submitted, has been proved by the authorities stated in this section. There is, indeed, a case of *Hovey* v. *Blakeman* (*d*), which imports a contrary doctrine, and that mere *inference* of an intention will be sufficient to restrain the wife's power of disposition incident to her separate estate. It therefore requires particular attention.

The question in that case arose upon a *petition*, and

(*a*) 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C. stated *infra*.
(*b*) 12 Ves. 501, stated *infra*. (*c*) 14 Ves. 302, stated *infra*.
(*d*) Stated 9 Ves. 524.

for that reason may not have been so fully considered, as if it had been discussed upon a bill. The trust was, "to pay the rents and profits, dividends and interest, to arise from the fourth part of a residue, in equal divisions, into the *proper hands* of the testator's two sisters for their lives to their separate uses." *Sir William Grant* thought that this amounted to a personal bequest to them, to be paid into their respective *proper hands*, and without a power of disposition, and that an absolute property was not intended to be given to them so as to impart such a power of disposition.

The observations upon the last case are these; that the limitation was sufficient to vest separate estates in the sisters to which the law, without regard to any intention of the settlor, annexed the *jus disponendi*. There is nothing particular in the trust, it even wants the words "from time to time," and merely directs payment of the rents, &c. into the proper hands of the sisters. Such also were the trusts in *Clarke* v. *Pistor*, *Witts* v. *Dawkins*, and *Brown* v. *Like*; yet in those cases it was held that such a direction did not deprive the married women of their equitable rights of disposition. In truth the direction of payment into the hands of married women for their separate uses is the old method of making such a settlement, and to use *Lord Eldon*'s language in *Parkes* v. *White* (*a*), "these words are only an unfolding of all that is meant in a gift to the *separate* use" of the wife. And with respect to the settlor's intention, it has been before observed that mere *inference* of it is insufficient to take away the general power of married women to dispose of their separate property, but that express declaration to that effect is required. That such is the rule was admitted by *Lord Eldon* in the above case of *Jackson* v. *Hobhouse*, although its effect might be "to defeat

(*a*) 11 Ves. 222.

the intention with which the power was given." Considering, then, this case to be in opposition to those preceding authorities, and even to the subsequent opinions of *Sir William Grant*, inferred from his decisions in the more modern cases of *Witts* v. *Dawkins*, *Brown* v. *Like*, and in *Sturgis* v. *Corp* (*a*), it is presumed that *Hovey* v. *Blakeman* is a case which would have been differently decided had the question come before the same Judge with more solemnity.

[In a late case (*b*) the trust was for the sole and separate use of the wife for life, so as not to be subject to the debts, control, or engagement, of her husband; the trustees were to pay the dividends, interest, and annual produce into the hands of the wife, and not otherwise, and the receipts of the wife alone for what should be actually paid into her own proper hands to be sufficient discharges. It was decided that these expressions did not restrain her from disposing of her life interest.

It is to be observed, that clauses restraining anticipation will only operate during coverture. Thus in a case (*c*) where personal estate was settled to the separate use of the wife for her life, so that she should not anticipate it, with remainder as she should appoint by will, and in default of appointment to her daughter, it was held that on the death of her husband she was entitled, with the concurrence of the daughter, to call for a transfer of the principal. The *Master of the Rolls* referred to *Brandon* v. *Robinson* (*d*), as establishing that the right of alienation is a necessary incident of property. He observed that the power of a feme covert over separate estate, being a creature of equity, equity might modify that power: but this reason only applied

(*a*) *Supra*, p. 184. (*b*) Acton v. White, 1 Sim. and Stu. 429. (*c*) Barton v. Briscoe, Rolls, 12th Aug. 1822. (*d*) 18 Ves. 429. 1 Rose, 197.

during coverture: when the married woman became discovert she had the same power over her property as other persons. The attempt to impose upon the power of alienation a fetter unknown to the common law of England might be permitted to the extent to which that power was created by equity, but not further.]

Such being the wife's power over her separate estate as a feme sole, and having before considered her authority to dispose of it without valuable consideration, we shall now proceed to examine,

II. The rights of the wife's *general* creditors upon her separate property.

Wife's general creditors have no valid claims upon her separate estate during her life. *Semble.*

In order to form a judgment upon these rights it is necessary to call to recollection the disabilities to which the wife is subject at law during the marriage. It has been observed (*a*) that by the common law, restored by the case of *Marshal* v. *Rutton* (*b*), a married woman was not allowed, except in special cases, to contract as a feme sole, nor as such to sue or be sued. That being the legal rule, the wife cannot at law bind herself by any contract in regard to her separate property. In conformity with this doctrine of the wife's disability, Courts of Equity hold that her *general* personal engagements will not affect her separate property. So far these Courts act in analogy to the common law; and the rule of equity is, that a married woman cannot by her general personal contracts bind her separate estate (*c*). To this extent Courts of Law and Equity act in concert. If, therefore, the wife contract debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a Court of Equity will entertain no jurisdiction for an application of such estate in the hands of her trustees to such purposes during her life. This was so

(*a*) *Supra*, p. 118. (*b*) 8 Term. Rep. 547. (*c*) 2 Dick. 562.

decided by *Lord Rosslyn* in the case of *The Duke of Bolton* v. *Williams* (*a*).

In that case the wife granted annuities for value out of a rent-charge, being her separate estate. These grants were void from defects in the memorials, but the annuities were nevertheless claimed by the annuitants and resisted by the wife. The owner of the land charged with the rent, not knowing to whom to pay it, filed a bill of interpleader; and one point insisted upon by the annuitants was, that if the grants were defeated by such omission as before stated, still they were intitled to be repaid their purchase moneys, with interest, out of the wife's separate estate. But it was determined against such title, because the specific charges having failed, the annuitants became *general* creditors only of the wife for the purchase money paid to her; and then, upon the principle that there was no equity for her general creditors upon which they could maintain a suit to enforce an appropriation of her separate property in the hands of her trustees for payment of their demands, the Court made such determination as above against the claims of the annuitants.

The remarks of *Lord Eldon* upon this case are these, "that it decided, in the most direct terms, that where a married woman, having separate property, has sold an annuity charged upon it, and the grantee has not taken care to make the charge available (for it was his business to do so), the person, whose grant as such fails, would *not* have an *equity* specifically to affect the fund clothed with a trust for the separate use of the married woman with the consideration; that *Lord Rosslyn* considered the case in two points of view, at law and in equity, and said, if the annuitants had an *action*, there was no occasion for equity to interfere;

(*a*) 2 Ves. jun. 138.

that if they had no action, there was no ground upon which a Court of Equity could interfere (*a*)."

The last case was acted upon by *Lord Eldon*, in that of *Jones* v. *Harris* (*b*), from which the above extract is taken.

It appeared that *A* was intitled to the rents of real estates to her separate use; out of which she granted an annuity to *B*, but the grant was *void* from the insufficiency of the memorial. Upon the bill of *B* for payment of the annuity out of the rents, the wife's separate estate, the same point was insisted upon as in the case of *The Duke of Bolton* v. *Williams*, viz. that as at law upon an implied *assumpsit* the grantee could recover in an action his purchase money, carrying the payments upon the annuity into account, so in equity *B*, being disappointed in the contract for the annuity, was intitled to be considered as *A*'s creditor, and although *B* had no lien upon the rents by virtue of the contract itself, still *A* having *separate* estate was to be considered in equity as debtor in respect of it, upon the ground of the *implied assumpsit*, and that the Court would consider *B*, if to be regarded as *A*'s *general* creditor, intitled to have the demand, due by virtue of that *assumpsit* (implied out of the failure of the contract), made good out of the rents and profits of *A*'s separate estate. But *Lord Eldon* dismissed the bill upon the principle stated in the case of *The Duke of Bolton* v. *Williams*, and observed that there was great difficulty in raising the implied *assumpsit* to charge the separate estate, in opposition to the intention of both *A* and *B*, and to the authority of that case. *B* (said his Lordship) had no right to complain that the Court did not interfere upon such an application, merely to remedy negligence, and that if *B* had any complaint

(*a*) 9 Ves. 498. (*b*) Ibid, p. 486. See also 3 Mad. 94.

founded in moral justice, it was entirely *B*'s own fault in not taking care to obtain a perfect security.

Deductions from the two last cases.

These two cases have established the following propositions; that the wife's general creditors have no claim upon her separate estate, and that if she intend to incumber her separate property for money by a particular mode of conveyance, as by the grant of an annuity, which fails for want of a proper inrolment of the memorial, the creditor has no equity to resort to such estate upon any implication, nor upon the principle that, as the separate and disposable estate of the wife, it is liable to her debts, and consequently to this particular demand; for such estate is not liable to her general creditors (one of which is the annuitant in the present instance) and to except this claim would be contrary to the intention of the parties to the transaction, who only meant specifically to pledge the identical property, and not to make the wife personally answerable in respect of such transaction.

It appears from an *anonymous* case (*a*) next mentioned, that the proposition that the wife's general creditors have no claim upon her separate estate, must be confined to the continuance of her life; for in that case a married woman having separate property, died indebted by bond and simple contract; and there having been a deficiency of assets to satisfy all her debts, the simple contract creditors insisted that those by specialty were not intitled to a preference, but that the distribution should be *pari passu*; and *Sir William Grant* said, that the circumstance of a debt contracted by a married woman being secured by bond, gave the creditor no priority; and that the bond, considered merely as a bond, being void (*b*), the consequence was that *all* the debts must be paid equally.

III. In the beginning of the last section it was

(*a*) 18 Ves. 258. (*b*) See *supra*, p. 125.

noticed that Courts of Equity, in analogy to the rule at law, determine that a married woman cannot bind herself by general contracts; the consequence is, that she or her separate property are not affected by them. Her creditors have no legal remedy, since the law exempts her person, and she is allowed to take no interest apart from her husband; but in equity, although she be permitted to possess and enjoy separate estate as a feme sole, yet those courts, holding, in analogy to the legal doctrine, that a wife's general engagements are not binding, refuse to entertain jurisdiction at the instance of her general creditors, to subject her separate property in the hands of her trustees, to their demands. Courts of Equity, however, as a consequence of the principle established by them, that a married woman may take and enjoy property to her separate use, enable her to deal with it as a feme sole. The right of disposition is an incident belonging to such interest and power; they therefore permit her to alien (*a*) or incumber her separate estate when she shows an *intention* so to dispose of it, but that intention is necessary to be manifested, as appears from the two cases last cited.

Having treated of the rights of the wife's general creditors upon her separate estate in the preceding section, we shall next proceed to consider her dispositions of it by sales and grants, or by securities given for *particular* debts.

Supposing, then, the wife to be under no restriction from disposing of her separate property in anticipation, it follows, from what has been said upon the subject of her power to make *voluntary* dispositions of her separate estate, that she must also have the like authority to sell, or make grants out of, or otherwise to incumber it.

(*a*) *Supra*, p. 182.

In arranging the several cases upon these subjects, it seems convenient to adopt the method which has been pursued in treating of the *voluntary* dispositions by the wife of her separate estate.

1. When property is limited to the separate use of a married woman *generally*, without giving to her any particular power of disposition, she may sell, pledge, or incumber it in the same manner as if she were a feme sole.

Bonds of wife good dispositions *pro tanto* of her separate estate in equity.

Thus in *Biscoe* v. *Kennedy* (*a*), leasehold and other personal estate were on the marriage of *B* settled in trust for her separate use. She was indebted by bond at the time of her marriage, and her creditor filed a bill for payment of it out of her separate property; and *Sir Thomas Clarke* declared that *B*'s effects vested in her trustees were to be considered as the property of a feme sole, and ordered the debt and costs to be paid out of 500*l*. *East India* stock, in the hands of her trustee (*b*).

The next case which I shall mention is *Hulme* v. *Tenant* (*c*). There, upon the marriage of *A*, her freehold and leasehold estates were settled in trust that the trustees should receive and pay the rents and profits of parts of them to the wife, for her *separate* use, and to convey the estates themselves to such uses as she by will, or by deed or writing under her hand and seal executed in the presence of two witnesses, should appoint; and in default of appointment, to the use of her heirs and assigns. The trustees were directed to

(*a*) 1 Bro. C. C. 17, in *notis*.

(*b*) In this case the creditor's bill was in the first instance dismissed. The husband afterward absconded, and was outlawed, and the creditor then filed another bill for payment out of the wife's separate estate, which was decreed.

(*c*) 1 Bro. C. C. 16. 2 Dick. 560, S. C. See also Pybus v. Smith, 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C. and Dillon v. Grace, 2 Scho. and Lefroy, Ch. Rep. 456.

sell the remainder of the estates, and out of the produce to invest 1000*l.* according to *A*'s directions, and the interest and profits were directed to be paid to her, and the *principal* to her or to her order, by note or writing under her hand, and for want of appointment, to her executors, &c. *A* and her husband joined in a bond to *B*, and she afterwards borrowed of *B* a further sum, which, with the old debt, amounted to 180*l.*, for which *A* gave her own bond. *B* filed a bill for payment out of *A*'s separate estate, but the 1000*l.* were out of the question, that sum having been wholly or nearly disposed of. The only point was, how far the rents of the estates unsold, and the estates themselves, were liable to *B*'s demand; and *Lord Thurlow* made no decision upon the liability of the estates themselves, but declared and decreed that the *rents* of her real estates were liable to satisfy the debt.

This case has been repeatedly considered as a very strong determination, but the reason for such a conclusion does not appear. The decree merely affects the *rents* of the wife's separate estate, and they were limited to her *separate* use generally, and without any restriction as to her power of disposition. The wife's joining in the one bond, and giving *solely* the other, could alone be necessary with a view to her separate estate. She *intended*, therefore, to charge it; and although from the circumstance of her being a married woman the bond was void at law, still it was a good contract in equity. In this case, then, there being a *jus disponendi* without qualification, together with an intention to exercise it, and also a good equitable security, it is conceived that *Lord Thurlow* could not make any other decree than that which was pronounced by him; a decree which has been followed in subsequent cases (*a*), and had the authority of the Mas-

(*a*) The case of Hulme v. Tenant has been followed by Heatly v. Thomas, 15 Ves. 596, where a bond given by a feme covert was

Extent of the liability

ter of the Rolls in *Standford* v. *Marshall* (*a*), next stated.

of a feme covert's separate estate to her debts and engagements.

held a charge upon her separate estate, and by Bullpin v. Clarke, 17 Ves. 305, and Stuart v. Kirkwall, 3 Madd. 387, where the same decision was made with respect to promissory notes. These cases may be considered as establishing, that the separate estate of a married woman is liable to debts, for which she has given a written security. The cases do not however entirely agree as to the principle upon which this liability is founded.

In Hulme v. Tenant, Lord Thurlow proceeded upon the general principle, that a feme covert acting with respect to her separate property, was competent to act in all respects as if she were a feme sole. If she had by instrument contracted, that this or that portion of her separate estate should be disposed of, in this or that way, she and her trustees might be decreed to make that disposition; but if she entered into an engagement which would make a feme sole personally liable, such general engagement entered into by a feme covert would not bind her as such. The determined cases however seemed to go thus far, that the general engagement of the wife should operate upon her personal property, and the rents and profits of her real estate. In giving judgment he observed that he had no doubt about this principle, that if a Court of Equity said that a feme covert might have a separate estate, the Court would bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c.

Lord Thurlow here treated the liability to general engagements as a necessary incident to separate estate, arising from the capacity of contracting which the possession of a separate estate confers; the only difficulty he felt was as to the mode in which execution was to be given to enforce the demand. The same view of the general liability of separate estate to debts appears to have been taken in several other cases. See Peacock v. Monk, 2 Ves. sen. 193. Lillia v. Airey, 1 Ves. jun. 277. Norton v. Turvill, 2 P. W. 144. In this view, it was not necessary to consider the security given for the debt, as an appointment or assignment intended to attach specifically on the property: the principles laid down in Hulme v. Tenant, apply equally to every contract, whether in writing, or merely verbal. The suit in Equity was looked upon only as a process for recovering a general debt, in which execution was to issue against a particular species of property.

One difficulty however occurs in the reasoning which led to this

(*a*) 2 Atk. 69.

In that case a father settled a real estate in trust for his daughters, with a direction that the rents should be

conclusion. The possession of separate property was said to enable a feme covert to act as a feme sole in respect of that property. It did not however follow that the disability of coverture was so far removed, as to give her a capacity of contracting generally, in matters not connected with her separate estate. For this reason it was difficult to support the principle of holding the wife's separate property liable to her engagements, unless it appeared that such engagements were formed with reference to that property, and that the person contracting with her, contracted with her " not as a married woman merely, but as a married woman having separate estate." 9 Ves. 498. The subsequent authorities seem to have narrowed the liability to this extent, confining it to cases where the contract is entered into with an intention (either real or presumed) of affecting the separate estate, and holding it to be specifically liable on the ground of that intention.

In Bolton v. Williams, 2 Ves. jun. 150, Lord Loughborough, adverting to the cases where the separate property of a feme covert had been held liable to a security given by her, said that the Court had there considered it as operating as an appointment of her separate property, and intimated that a general creditor could not have it applied in satisfaction of his debt. So also Lord Eldon, in speaking of Hulme v. Tenant, took a different view of that case, from that which, according to the report, was taken by Lord Thurlow, considering it as depending on the supposition that the wife intended to charge her separate property, and as deciding that the execution of the instrument was a sufficient indication of that intention. See 8 Ves. 175. 9 Ves. 493, 497. 11 Ves. 225. The same principle has been explicitly stated by the Vice Chancellor. In Stuart v. Kirkwall, 3 Madd. 389, his Honour observed, " that a feme covert being incapable of contract, this Court cannot subject her separate property to general demands; but that as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate." In such cases the security is implied to be an execution of her power to charge the property. 3 Madd. 94. See Aguilar v. Aguilar, 5 Madd. 414.

This rule of holding that a general security executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, is intended as an appointment of that property, or a charge upon it, has often been remarked upon as a strong instance of implication, founded more upon a desire to do

paid to them, whether sole or covert, for their separate uses, either into their own hands, or the hands of any

justice, than upon any satisfactory reasoning. The only argument in its favour seems to be, that the security must be supposed to have been executed with the intention that it should operate in some way, and that it can have no operation except as against the separate estate. See Lord Redesdale's observations in 2 Sch. and Lef. 264. It might (perhaps with equal justice) be contended that all the pecuniary engagements of a feme covert should be considered as having been formed with reference to her separate estate, as she has no other means of satisfying them.

It seems to be at present unsettled whether the separate estate will be rendered liable by a contract expressed in a memorandum or other document, not referring to the property, and not purporting to be a security for money. According to the late cases the question would be, whether the intention of affecting the separate estate, which is implied from the execution of a bond or other security, is also to be implied from written instruments of other descriptions. A point of this kind arose in Francis v. Wigzell, 1 Madd. 258, on a bill against an husband and wife, for the specific performance of an agreement entered into by them for the purchase of an estate. The Vice Chancellor (Sir T. Plumer) observed, that in order to render the wife liable, it was necessary to show that she had a separate estate, and that she had contracted in respect of it. The case was decided on the ground that the bill was filed against the husband and wife only, and was not framed with a view to a decree against the wife's trustees, the only mode of affecting separate estate.

The extent to which separate property may be subjected to the demands of creditors, claiming under parol agreements, has not been determined. If the separate property consists of land (as in Clark v Miller, 2 Atk. 379) it will of course not be liable. But if it consists of personalty, and the feme covert has verbally agreed that part of it shall be appropriated to payment of a debt, there seems to be no objection to holding that this agreement constitutes a lien. If, however, the verbal agreement be made without reference to the separate estate, it falls under the head of those general engagements, which according to the late cases are not binding. But there may perhaps be cases, where, without evidence of an express promise by the feme covert to pay out of her separate estate, the circumstances may prove that that was in fact the nature of the agreement or understanding between her and the person with whom she has contracted. Thus, if a married woman be known to be living upon separate property and apart from her husband, it is generally inferred that her

person that they should appoint. The daughters joined with their husbands in *bonds* for money advanced to

dealings with tradesmen and others who trust her take place on the credit of this property. (See *ante*, 110. Note. And *post*, chap. 22, Sec. 4). And hence such contracts might perhaps be considered in the same light as if the separate estate were expressly referred to as the fund for payment.

In two instances (Anon. 18 Ves. 258. Gregory v. Lockyer, 6 Madd. 90), decrees were made for payment of the debts of married women out of their separate estates, after their deaths: but it does not appear whether they proceeded upon the notion of the property being liable generally, or whether they turned upon other circumstances: the debts might have been charged on the property by her will, or the decrees might have been intended to leave the question of the extent of the liability open for discussion, when the circumstances under which the different debts were contracted should be ascertained. The death of the wife could not on principle make any difference. In Court v. Jeffrey, 1 Sim. and Stu. 106, the Vice Chancellor distinguished between the administration of assets in ordinary cases and the administration of the separate estate of a deceased married woman, on the ground that in the latter case the interest of the legatees could not be defeated by debts.

In Clinton v. Willis, Rolls, 15 Dec. 1820 (cited Sugden on Powers, 115), a similar decree had been made by consent or agreement between the parties. A question was raised whether the Master ought to have allowed debts not secured by any written instruments. The report had been confirmed, and the Master of the Rolls (Sir T. Plumer) therefore said that the objection came too late, but his opinion appeared to incline against it: he asked why a verbal direction should not be sufficient?

In Gregory v. Lockyer, the decree also directed the payment of the wife's funeral expenses out of her separate estate: but the Vice Chancellor expressed a doubt whether the husband was intitled to throw these expenses on the fund. In Bertie v. Lord Chesterfield, 9 Mod. 31, it was decided that the husband was bound to pay the expenses of the wife's funeral, though the latter had a settlement of separate maintenance, with power to make a will, by which she had disposed of some property in legacies.

The different principles upon which the liability of separate estate to debts has been supported, lead to some practical results, materially different.

In the case referred to above, which is shortly reported in 18 Ves. 258, it appears to have been held that in the administration of sepa-

the husbands, for the payment of which out of the rents, the obligees filed their bill; and the Master of the

rate estate amongst creditors, all were to come in *pari passu*, and it is plain that this must be the course of administration, if the principle be that the separate property of a feme covert is liable to her debts generally, and that her contracts are for this purpose looked upon as the contracts of a feme sole. But if the principle be (according to the later cases) that the separate property of a feme covert is liable only to contracts made with the intention of affecting that property, and that a security executed by her operates as an appointment or charge creating a lien, it seems to follow that if there be several creditors claiming under such securities, the ordinary rules applicable to specific incumbrancers ought to be applied to them, and that they are therefore to be paid according to their priorities in point of time. On the same principle a creditor by bond or promissory note, having a specific lien on the fund, would (in the absence of any special circumstances) prevail over a subsequent purchaser, to whom the whole fund has been appointed or assigned.

In Nantes v. Corrock, 9 Ves. 182, it was alleged that the defendant, a feme covert, had while in the service of the plaintiff's testator, received monies on his account and appropriated part to her own use, and one of the objects of the suit was, to have an account of her receipts and expenditure, in order that the balance might be paid out of her separate estate consisting of stock: but the Lord Chancellor refused this part of the relief prayed, on the ground that stock is by law exempt from execution and sequestration, and is therefore not liable, except at the suit of persons showing a lien upon it. For the same reason it will follow that stock settled to the separate use of a married woman, cannot during her life be rendered liable to creditors, if their demands be considered as general debts merely. This difficulty, however, will not exist with respect to debts due on bonds or other securities, if the principle be that they operate by way of appointment or charge, giving a lien on the fund.

The above remarks apply to the liability of separate estate to express contracts. With respect to other demands arising from circumstances, under which an implied contract would be raised at law, it has been settled by Bolton v. Williams, and Jones v. Harris, cited *supra*, that they do not attach on separate estate: those cases were followed in Aguilar v. Aguilar, 5 Madd. 414. If, however, property has been fraudulently acquired by a feme covert and transferred to trustees for her separate use, the parties intitled may follow it and recover it from the trustees, if still in their hands: Greatley v. Noble, 3 Madd. 79. But it seems from this case that her separate estate would not be liable to answer for the property acquired

Rolls decreed accordingly, upon the principle that the daughters having an absolute power over the rents, their bonds operated as good *liens* upon their interests.

So also in *Wagstaff* v. *Smith* (*a*), 750*l. four per cent.* Bank annuities were limited in trust "to permit *B* to take or receive the dividends to her own use for life, independent of her husband *C*, or any future husband." The husband and wife, in consideration of a sum of money paid to them by *D*, assigned the dividends to a trustee during *B*'s life, to secure the grant of an annuity to *D*, and the grant was established. Again,

As also are grants of annuities by her.

The case of *Power* v. *Bailey* (*b*), was to the like effect as the last. There, previously to the marriage of *A* with her first husband *B*, it was by articles of settlement agreed that her estates should be vested in trustees for her sole and separate use, and that she should have full power and dominion over them. *A*, prior to the marriage of *C*, (for whom she was under promise to provide) settled, with the privity of *B*, and in execution of her power, an annuity upon *C*, which *C* and her husband afterwards mortgaged. Payment of the annuity having been discontinued by the second husband of *A*, and a suit instituted by the mortgagee, *Lord Manners* determined that *A*'s separate estate was bound by the grant.

It will be noticed that the last case is an additional instance of the wife's power of disposition over her *real* estates during the marriage, when they were not conveyed to trustees, and the power rested merely in agreement between her and her husband before the coverture (*c*).

It is observable that the last cases are instances of

by the fraud, unless identified and traced into the hands of her trustees. On this question see Nantes v. Corrock, *ub. sup.*

(*a*) 9 Ves. 521. (*b*) 1 Ball and Beat. 49. See also Parkes v. White, 11 Ves. 210, stated *infra*. (*c*) See *supra*, p. 178.

the wife's power of selling and incumbering her separate property as incident to the nature of the interest which she took in it as a feme sole, to which may be added the cases of *Fettiplace* v. *Gorges*, and *Rich* v. *Cockell*, stated in a preceding page (*a*). These authorities, it is conceived, are sufficient to establish the proposition that the wife may dispose of, sell, or incumber, her separate estate, upon a pure limitation of it to her separate use. Notice must be here taken of *Mores* v. *Huish* (*b*), determined by the same judge who decided the case of *Whistler* v. *Newman* before stated (*c*); and it will be found upon examination, that the case of *Mores* v. *Huish* is not only in opposition to the cases before mentioned upon this subject, but also to those which have been determined upon the principle that a married woman is to be considered a feme sole to all intents and purposes in regard to her power of disposition of property limited to her separate use.

The case of Mores v. Huish considered.

Mores v. *Huish* was to this effect; the wife's freehold estates were vested in trustees, and settled in the following manner: Upon trust yearly to receive and pay the rents to her (*A*, the wife of *B*), as and when the same were received, or otherwise in their discretion to permit her and her assigns to receive them during her life, for her *sole and separate use*, notwithstanding her then present, or any future coverture. Her receipt was declared to be a sufficient discharge for the rents, and that they should not be liable to the debts, &c. of her then or any future husband, but *be solely at her disposal*. The trustees after *A*'s death were to pay the rents to *B* for life, and upon his decease to convey the estates to the children in tail general, and in default of issue, to the survivor of *A* and *B* in fee. *A* and *B* granted an annuity to *C*, secured upon the estates;

(*a*) *Supra*, p. 184. (*b*) 5 Ves. 692. (*c*) *Supra*, p. 185.

but before the deeds were executed, the surviving trustee gave notice to the annuitant, that he *would not consent* to any mortgage or alienation, and informed him of the extravagance of *B*, the husband, who could give no security. Notwithstanding this caution the purchase of the annuity was completed. A bill was filed by *C*, to subject the rents of the wife's separate estate to the payment of the annuity. But *Lord Rosslyn* dismissed the bill, with costs: first, because he doubted the power of a married woman to give such a security; secondly, because she had no power of appointment given to her; and thirdly, because the trust was that the trustees were to receive the rents and pay them from time to time to the wife's separate use; and fourthly, because *C* had notice from the surviving trustee not to complete the purchase.

To the first and second reasons it may be answered (as it has been before proved (*a*)), that the wife has absolute dominion over her separate property, and without the authority of a special power, to dispose of it as she pleases. Under this the wife's general power to alien her separate estate, the cases stated in the beginning of this section were decided. To the third reason it may be replied that the words "from time to time" did not occur in this case, but that if they had occurred, or if the words used, viz. "as and when received," be of the same import, their insufficiency to restrain the wife's general power of disposition incident to her having separate property, has been before shown, and will further appear from the cases after stated in this section. And with respect to any difference being made by the trust being express, that the trustees should receive and pay the rents to the wife, it cannot be contended with any degree of plausibility that it amounts to more than a mode to give the property to

(*a*) *Supra*, p. 182, *et seq.*

her separate use and disposal. *Hulme* v. *Tenant* (*a*) was a trust of this kind, and yet *Lord Thurlow*, after great consideration, held that such trust did not preclude the wife's power as a feme sole to alien her separate interest. And in *Parkes* v. *White* (*b*), *Lord Eldon* considered a trust like the present to mean no more than a gift to the wife's separate use. In answer to the fourth reason assigned by *Lord Rosslyn*, I shall state the case of *Essex* v. *Atkins* (*c*), which is also an additional instance of the grant of an annuity by a married woman out of her separate estate being supported.

Although the annuities be granted contrary to consent of wife's trustees, of which the annuitants had notice, such grants will be good.

The object of the bill was to establish the grant of an annuity out of 3000*l.* 5 per cent. Bank annuities bequeathed to *A* before her marriage with *B*, which were not to be subject to the debts, control, or engagements of any after-taken husband. The wife insisted by her answer that she did not voluntarily consent to the transaction, but that her concurrence was obtained by duress. Evidence was produced on the part of the annuitant, that the business was explained to the wife, and that she was anxious that it should proceed; that the deed was read to her, and that she appeared satisfied. It was also proved that one of the executors or trustees informed the annuitant before the transaction was completed, that he and his co-executors would not pay any of the dividends except to *A*, and that he also stated to the annuitant complaints made by the wife of her husband's ill-treatment in consequence of her refusal to join him in raising money; the executor also produced the will. Under these circumstances the question was, whether the Court would enforce payment of this annuity out of the wife's separate estate? And *Sir William Grant* said that the only doubt which he had in the case arose out of *Lord Rosslyn*'s judg-

(*a*) *Supra*, p. 240. (*b*) *Supra*, p. 231. (*c*) 14 Ves. 542.

ment in *Mores* v. *Huish*, in which case the bill of a purchaser of an annuity was dismissed upon the ground that he had *notice* from the trustee of the wife that it was a very bad and improvident bargain, and that he never would consent to it: that in this case (*Essex* v. *Atkins*) the purchaser was cautioned against making the purchase by the trustee, upon the ground that the married woman had expressed great reluctance to pledge or part with her separate property for the accommodation of her husband, and that if he did purchase, they never would pay; therefore, according to *Lord Rosslyn*'s opinion in *Mores* v. *Huish*, the Court *ought not to interpose* under such circumstances, for the purpose of giving effect to the purchase. After thus comparing the two cases, his Honor observed, in opposition to *Lord Rosslyn*'s opinion, that it was only in equity that the contract of a married woman with regard to her separate property could be inforced; the Court, therefore, must of necessity decide upon its validity, and could not leave the purchaser to a legal remedy, because he had none; so that not to act was the same thing in effect as setting aside the contract; and his Honor added, that he did not know how he could say that the annuitant ought to have no remedy of any kind, except upon the ground that there was no valid contract. The Master of the Rolls then in allusion to the opinions of *Lords Thurlow* and *Rosslyn* observed, that in *some* cases *Lord Thurlow* acted with *extreme reluctance* for the purpose of giving effect to the improvident engagements which the wife had entered into; yet he did not *think* himself at liberty to say that the Court would not at all interpose where the subject was entirely of equitable jurisdiction. Upon the effect of the assent or dissent of trustees upon the wife's power of disposing of her separate property his Honor remarked, that if the transaction could not upon its own merits be impeached, he did not see how any declaration by the trustee in this case could render

it null and void. The established doctrine was (notwithstanding *Lord Rosslyn's* doubt), that a married woman can bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her that property (*a*). Their *dissent*, therefore, could not have any effect where their *assent* was unnecessary, and their declaration that she was unwilling could not be evidence of the fact that she parted with her property by coercion. Upon the whole his Honor concluded, that if upon the evidence the wife was a free agent, and understood what she did, the Court had no choice, but must give effect to her contract; that the evidence proved her consent, and there was nothing in it which would have authorised the Court to set aside the agreement if she had filed a bill for the purpose. The contract was therefore enforced.

This case, and the principle upon which it was decided, a principle that has been repeatedly acknowledged and acted upon both before and since *Mores* v. *Huish*, have taken away all authority from that case and from that of *Whistler* v. *Newman* before stated (*b*).

Equities of purchasers and creditors on wife's separate estate claiming under appointments made in virtue of special powers.

2. The cases which have been considered were upon limitations of property to the wife's separate use *generally*, and without any special power of disposition given or reserved to her; and it has been before noticed (*c*), that when the wife takes only a partial interest, as for life, with a power to appoint the capital, she must *duly* execute such power, in order to pass the absolute interest in the fund to a *volunteer*. But this is not so when the appointees are purchasers, incumbrancers, or creditors; for, since Courts of Equity supply defective executions of powers in favour of such persons, if the wife, for a *valuable* consideration, pur-

If the powers be defectively executed, such defects will be supplied in equity.

(*a*) *Supra*, p. 215. (*b*) *Supra*, p. 185. And see Allen v. Papworth, 1 Ves. sen. 163. (*c*) *Supra*, p. 206.

port to execute her power, and it should prove defective, the appointee will be intitled to have such defect supplied in a Court of Equity (*a*). Accordingly, in *Chapman* v. *Gibson* (*b*), the Master of the Rolls said, he thought that the jurisdiction of a Court of Equity in supplying defects in the execution of powers and the surrenders of copyhold estates was founded upon one and the same principle.

But the powers must by some acts have been intended to be executed.

But although defective executions of powers will be remedied in favour of purchasers and creditors, the Court cannot interfere if the powers be not *attempted* to be executed (*c*). The intention to execute them must be apparent; for unless that were so, if a Court of Equity should nevertheless assume jurisdiction, it would exercise powers of appointment, instead of supplying defects in the executions of them.

And the defects must not be such as to destroy the deeds.

The defects to be supplied must be understood to be such which do not destroy the instrument of appointment itself; for we have seen, that if a married woman charge her separate estate with an annuity, and the deed granting it become void, from a proper memorial of the deed not having been inrolled, the annuitant has no relief in equity (*d*).

When necessary for a Court of Equity to supply defects in the execution of powers.

Upon the interference of a Court of Equity to remedy the defective executions of powers for creditors and purchasers, the following conclusions may be drawn from the contents of this and the last chapter, attending to the distinctions;—first, when the wife has a mere power to appoint the capital; secondly, where she has neither power over nor interest in the capital, except the annual produce limited to her se-

(*a*) Cowp. 267. Sergeson v. Sealey, 2 Atk. 412, 415, stated *supra*, p. 219. Tollet v. Tollet, 2 P. Will. 490. Hervey v. Hervey, 1 Atk. 563. Cotter v. Layer, 2 P. Will. 623. (*b*) 3 Bro. C. C. 231. (*c*) Bull v. Vardy, 1 Ves. jun. 270. See also 2 Vern. 69. 1 Bro. C. C. 21. 17 Ves. 388, 460, 462. (*d*) *Supra*, p. 236.

parate use for life, with a particular power to dispose of such produce, not amounting to a prohibition to alien it by anticipation; and, thirdly, when the wife takes an absolute interest in the fund, accompanied with certain powers or qualifications for the disposal of it, merely prescribed in consequence of the wife's condition as a married woman. In the first case it is necessary for the wife to make an appointment of the principal fund either to a creditor or purchaser: in which event, if the appointment be defective, a Court of Equity will remedy the error (*a*). But in the second and third cases, since special appointments under the particular powers are unnecessary, there is no occasion for a Court of Equity to supply any deficiencies in them; for it is presumed, that if the wife by deed or will purport to dispose of or incumber her se-

(*a*) But see the remarks on this point made by the Master of the Rolls in Martin v. Mitchell, 2 Jac. and Walk. 423, where an husband and wife having a power over an estate (not settled to her separate use) had agreed in writing to sell it. His Honour inquired if there was any case in which an husband and wife having a power of appointment by deed over the wife's estate, a paper not executed *modo et forma* pursuant to the power, had been held to take effect as an appointment. If it was signed by a person competent to contract, and was for a valuable consideration, but defective in form, there was a remedy in equity, for then there was a valid contract to stand upon. But with a married woman there could be no binding contract. Without giving a definitive opinion, he felt that there would be great difficulty in extending the doctrine of the Court as to defective executions to instruments signed by married women: it would be introducing quite a new line of cases. The power gave a competency to act with certain protections, but he thought it a weighty question, whether it could be held to give a general competency. In Hulme v. Tenant, Lord Thurlow said the Court had not gone so far as to order a power to be executed; and thought that the wife's bond did not affect the reversion of the real estate, over which she had a general power of appointment, with a limitation to herself in fee, in default of appointment. In Dillon v. Grace, 2 Sch. and Lef. 456, the bond had the formalities required by the power, and was held a complete execution.

parate estate, the disposition will take effect out of her separate interest, if it cannot do so under a due execution of her power. It is upon this principle that the cases have proceeded, in paying little attention to the forms or requisites of the instruments of appointment in relation to the powers under which they were made, when it was settled that the wife took the property in the character of a feme sole. This has been shown from the cases already mentioned, and it will further appear from those next stated, in which, although special powers of disposition were added to limitations to the separate uses of married women, the alienations and charges of their separate estates were supported in equity under the general *jus disponendi* belonging to such interests, and not as due executions of the special powers also given for those purposes; and they are instances of what has been before noticed, viz. that a direction for payment to the wife of her separate annual income "into her own proper hands," or "from time to time," will not abridge or destroy her general power of disposition by anticipation.

Thus, in *Pybus* v. *Smith* (*a*), a settlement was made upon the wife under the directions of the Court of Chancery, by which her real and personal estates were vested in trustees, upon trust as to the real to permit *A* the wife to receive the rents for life, or to pay them to such persons, &c. as *A* by deed or writing under her hand, with or without power of revocation, "from time to time" should appoint, and in default of appointment to her sole and separate use for life, and after her death, if no children (which was the case), to such persons, &c. chargeable with such sums, &c. as *A*, whether covert or sole, should, by any deed or writing under her hand and seal, to be by her duly executed in the presence of two or more witnesses, appoint, and

(*a*) 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C.

in default of appointment in trust for her absolutely. The personal fund was limited in the like manner, except that in her power of appointment the words "from time to time" were omitted; and the ultimate limitation of it was to her executors and administrators. In the year 1785 *A* by deed, executing her power, appointed the then and *future* rents of her real estates during her life, and the estates themselves after her death, also the then and *future* interest of her personal estate, and the capital after her death, if she left no issue, in favour of *B* and *C*, as a security for the debt of her husband *D*. *A* by a subsequent deed in the same year appointed the rents and interest of her real and personal estates to *D* her husband during her life, and also the estates after her death, without leaving issue, to her husband absolutely. *D* by a deed in 1786 made a further security of the premises to *B* and *C*. And upon the bill of *B* and *C* to have the benefit of these securities against the separate estate of *A*, *Lord Thurlow* directed the Master to inquire under what circumstances the two first deeds were obtained and how executed; his Lordship observing, "that it was very fit, in the case of a married woman, that the Court should know how she had disposed of her property, and that these cases had not been sufficiently attended to (*a*)." The Master having reported that the deeds were fairly entered into and properly executed by *A*, his Lordship decreed in favour of the claim of *B* and *C*, upon the right of a married woman to act as a feme sole in relation to her separate property, holding that the direction of payment "from time to time," did not alter such right.

So, also, in *Witts* v. *Dawkins* (*b*) the trust was, that the trustees should pay the rents of the premises to such person or persons *only*, and for such purposes *only*, as *B* the wife should by any writing or writings,

(*a*) See p. 217. (*b*) 12 Ves. 501.

to be signed with her hand from "time to time," notwithstanding coverture direct or appoint, and in default, and in the mean time, and from *time to time until* she made such appointment, the trustees should pay the rents into her *proper hands* for her sole and separate use, exclusive and without the intermeddling of her husband, and to whose debts or control the same were not to be liable, and *B*'s receipts were to be good discharges. *B* agreed to sell to *C* the rents, and upon his bill for a specific performance of the contract it was so decreed.

In *Browne* v. *Like* (*a*), the trust was to permit *A* during the life of *B* her husband to receive the residue of dividends upon certain stock, and the whole of them after *B*'s death, for her sole and separate use for life, and to pay the same "into her own proper hands" for her own separate use and benefit, and that her receipts "from time to time" should be good discharges, and that no part of the dividends should be subject to her husband's debts. *A* and her husband concurred in a sale of 20*l.* a year, part of the dividends, to *C*, upon whose bill *Sir William Grant* decreed in affirmance of the sale.

Upon the principle of the wife's right to dispose of her separate interest for life, under the general power which the law gives her as incident to that estate, without regard to the particular power or directions prescribed for the purpose by the settlor, the case of *Bullpin* v. *Clarke* (*b*) was decided.

In that case, upon the marriage of *A* with her husband *B*, several of her real estates were settled upon trust, that the trustees should receive the rents and pay them to such person or persons, &c. as *A* at any time during her life notwithstanding coverture should appoint, and in default of appointment to pay them

(*a*) 14 Ves. 302. (*b*) 17 Ves. 365.

into "her proper hands" for her sole and separate use. Her personal estate was also vested in the same trustees for her sole and separate use, and to be applied as she should direct. *A* borrowed 250*l.* upon her promissory *note* from *C*, who instituted the present suit to obtain payment of the debt out of *A*'s separate property. And *Sir William Grant* decreed that the principal, interest, and costs, should be paid by the trustees out of the rents and profits of the estates.

IV. Having considered in the preceding pages the wife's power of disposition of her separate estate in favour of volunteers, purchasers, and creditors, I shall proceed in this section to show,—

When the wife will and will not be intitled to relief in equity against such dispositions of her separate property in favour of creditors or purchasers.

It has been before shown that a married woman is to be considered a feme sole in relation to her separate estate, and that she has power as such to give away or otherwise dispose of it. It follows from this proposition, that her equity for relief against gifts or dispositions of her separate property must be the same as that which is sufficient to defeat similar acts amongst persons in general; such as fraud, surprise, undue influence, &c. (*a*)

(*a*) When a married woman seeks to be relieved against a sale of a reversionary interest in property given for her separate use, on the ground of inadequacy of consideration, the question depends on principles similar to those applied to other sales of expectant rights: on which subject see the cases collected in vol. i. p. 232, *et seq.* and Ryle v. Swindells, M'Cleland's Exch. Reports, p. 519, and Head v. Rosher, M'Cleland and Yonge's Exch. Reports, vol. i. p. 89. In the latter case, the Lord Chief Baron said, that he could not bring himself to adopt the principle laid down in Gowland v. De Faria, 17 Ves. 27: and he held that a private sale of a reversionary interest was not to be set aside on the ground that the price paid was less than the full value as calculated by an actuary.

In *Grigby* v. *Cox* (*a*) it was holden, that the wife's concurrence *with* her husband in a sale of her separate estate, and without the joining of her trustees, could not be impeached, there being no evidence of imposition or undue influence. The principle was, that the wife might have appointed the property to her husband, and therefore that his being a party with her in a sale to a stranger could not vitiate the transaction. In that case the husband covenanted that the estate was free from incumbrances; and *Lord Hardwicke* said that such circumstance made no difference, since the demand of such a covenant from him was but a reasonable request and precaution against a prior secret appointment of the wife, and that the husband alone was the person answerable for a breach of it.

Instances of wife not being relieved against her separate contracts.

So also in *Masters* v. *Fuller* (*b*), *A* (the wife of *B*, who had agreed to take a house of *C* at the rent of 20*l.*) having separate property, entered into an agreement *without her husband's knowledge*, to pay *C* an *additional* rent of 18*l.* for the house, in consideration of its being differently fitted up, and which she paid up to her death. *A* appointed her husband *B* executor of her will, who filed his bill to be relieved against this agreement of *A*, charging it to have been a fraud upon *A*, and obtained by improper means, but which *C* denied in his answer, and stated that the house was fitted up by *A*'s direction, and according to her fancy, and that both rents formed but a moderate rent in the whole for it. The counsel for *B* contended that the agreement being concealed from *B* was a fraud upon him as *A*'s husband, and also upon him as standing in *A*'s place, who would have been relieved against the contract if she had been living. But the Lords Com-

(*a*) 1 Ves. sen. 517. See also Essex v. Atkins, 14 Ves. 542, stated *supra*, p. 250.

(*b*) 4 Bro. C. C. 19.

missioners of the Great Seal thinking otherwise, dismissed the bill, without hearing *C*'s defence.

The two following cases seem to establish (notwithstanding the suspicion which attaches to purchasers by trustees from their cestuique trusts) (*a*), that if the wife sell her separate estate to her trustee, and the transaction be *bonâ fide* and for a proper consideration, the disposition will be valid.

Sales by wife to her trustee, when valid.

Thus, in *Davison* v. *Gardner* (*b*), the wife being intitled to a brewhouse to her separate use, vested in a trustee for her, sold it to him for its full value, and no fraud appeared in the transaction. To set aside this sale, the wife filed her bill, but it was dismissed by *Lord Hardwicke*.

In *Parkes* v. *White* (*c*), the real estates of *Mrs. Parkes* were limited by settlement to *White* and his heirs to the use of *Mrs. Parkes* for life, and to preserve contingent remainders in the usual manner, but in trust, to permit her to receive the rents for her separate use for life, remainder to such persons, &c. as she, notwithstanding her coverture, by *will*, or any writing purporting to be her will, should appoint; and in default of appointment, to the use of an only child, absolutely, but if more than one, in trust to sell the premises, and divide the proceeds amongst them, as therein mentioned, with the ultimate limitation, if no issue, to her right heirs. By deeds in *May* 1779, *Mrs. Parkes* and her trustee mortgaged her life estate to *A* for a debt of her husband; and by other deeds in *May* 1785 reciting untruly that she and her husband were intitled to *sell* the trust estate, *White* and the legal personal representative of *A*, the mortgagee, in considera-

(*a*) Coles v. Trecothick, 9 Ves. 234. Randall v. Errington, 10 Ves. 423. (*b*) Stated in Sugd. Vend. and Purch. 4th Ed. 485, 486. (*c*) 11 Ves. 209.

tion of the discharge of the mortgage and of 800*l.* paid to *Mrs. Parkes* and her husband (in the whole 1000*l.*) and at their request and by their direction (who agreed to levy a fine, which was afterwards levied) conveyed to *Evans*, the heir of *A*, the premises in fee. *Mrs. Parkes*, in order to complete the title of *Evans* under her *power*, made a *will*, appointing him executor, and devised to him the inheritance of the estate; and for the purpose of preventing any revocation of such will and a new appointment, the husband gave to *Evans* a bond with a condition to that effect. In *August*, 1785, *White*, the trustee, bought the premises of *Evans* for 1000*l.*; and in 1793 he sold them to *Quarman* for 1500*l.*, to whom he gave a bond of indemnity against *Mrs. Parkes* and her husband. In *April*, 1799, *Mr.* and *Mrs. Parkes* executed another instrument, by which, after acknowledging their receipt from *White*, the trustee, of 200*l.*, stated by him to be the difference of price between *Evans*'s purchase in 1785 and that of *Quarman* in 1793, after deductions, &c. and that *Mrs. Parkes* had made a will in favour of *Quarman*, they engaged that she should not execute another will, nor do any act to molest *Quarman*, his heirs, &c. At the time of *White*'s purchase, the net rent of the estate was 50*l.* *Mrs. Parkes* endeavoured to set aside these transactions upon the grounds of her not having received a valuable consideration, and of her being under the control and influence of her husband and *White;* her bill charging that *White* had attempted to make undue advantages by taking a conveyance of the trust estate from her; and that *Quarman* had notice of the settlement, and took a bond of indemnity from *White*, which notice and bond he admitted in his answer, but claimed the benefit of the purchase as made without fraud, or at least to be allowed the *rents* received on account of his purchase money and interest, and to stand as a mortgagee for the residue to the full amount of the principal and interest of all monies *White*, the trustee,

might have advanced for the use or by the direction of the wife. The objects of the suit were, first to subject the legal estate in the settled property in *Quarman* to the settlement uses, at least subsequent to the trust for the wife's separate use; and secondly, for a declaration as to her interest (notwithstanding her acts and the remote periods when they were done) that *White* and *Quarman* were *trustees* of the rents during the whole time for her separate use. But as to the wife's *separate* trust estate for life, let in by levying the fine, *Lord Eldon* decreed that *Quarman* was intitled to it on the principle of the wife's right to dispose of it as a feme sole; and that *White* being a mere trustee to preserve contingent remainders, and to pay the rents to the wife's separate use, was not such a trustee to whom the doctrine of the Court, in regard to trustees buying trust property, applied (*a*). But that as to the limitations in the settlement to the general appointment of the wife after her death by *will*, and in default of any to her children, his Lordship held, that they were not affected by the transactions, since *White* being a *trustee* to protect the ambulatory appointment of the wife and the interests of her children, the transactions could not be supported in breach of those duties, and from what appeared on the face of the instruments (*b*). The wills, therefore, were ordered to be delivered up; and *Quarman* was directed to convey the premises to new trustees to *his own use*, during the wife's life, with remainder upon the trusts of the settlement, except as to the ultimate reversion, which was to be limited to himself in fee. This ultimate reversion, the reader will have observed, belonged to the wife; and it is presumed that it was excepted in favour of *Quarman* from the effect of the fine which was levied.

Circumstances under which

I shall now advert to a case where a creditor of the

(*a*) 11 Ves. 226. (*b*) 11 Ves. 231. 235.

husband procured himself to be appointed a trustee of the wife's separate estate, and then prevailed with her to execute a deed providing for payment of the interest and principal of the debt out of her separate property vested in him as her trustee, under which circumstances the Court set aside the transaction.

wife's dealing with her trustee concerning her separate estate was set aside.

The case alluded to is *Dalbiac* v. *Dalbiac* (*a*). There 65*l.* long annuities, the separate estate of *A*, the wife of *B*, were vested in the executors of her surviving trustee. In *May*, 1796, *B* and his uncle *D* procured *A* to join with him, *B*, in a bond to *D*, for *B*'s debt. The executors refused to pay the interest out of *A*'s estate, and *D*, the creditor, and *E* were appointed new trustees under a decree obtained for the purpose, and the annuities were transferred into their names. Immediately after this transfer, *D*, without consulting *E*, his co-trustee, prevailed upon *A* to execute a deed, declaring that the new trustees should be possessed of the annuities upon trust to apply them in payment of the interest of the debt, from *March* preceding the date of the bond, and the surplus to *A* for life, and after her death to discharge the principal out of the capital fund, which was limited to the wife absolutely in the event of her leaving no child. *B* the husband being dead, *A* filed a bill to be relieved against the above securities, and for a transfer of the annuities to herself, there being no child; also for payment of the amount of *D*'s receipts since he became a trustee. *D* insisted upon the fairness of the transaction, but acknowledged that his consent to become a trustee was with the design of repaying to himself his debt more readily out of *A*'s separate estate. *E* the co-trustee did not sign the deed. *Sir William Grant* decreed the securities to be delivered up, because *D* imposed upon the Court in *suppressing* his debt for the purpose of being appointed

(*a*) 16 Ves. 116.

a trustee in order to obtain dominion over the fund, and with it to pay his own debt; that *D*, therefore, was precluded from setting up such demand against *A*, and could not be allowed the benefit of the deed obtained under the above circumstances. With respect to *D*'s receipts, his Honor decreed, that an account could not be taken farther back than from the husband's death, as he and his wife lived together; and that since she, during his life, would not be intitled to an account against his representative, she was equally precluded against his creditor and assignee (*a*).

Effect of wife's acquiescence.

If, however, the wife, with full knowledge of her rights, acquiesce for a length of time in dispositions of her separate property, against which she might originally have obtained redress, the Court will not relieve her (*b*). This appears from *Lord Hardwicke*'s clear and elaborate judgment in *Pawlet* v. *Delaval* (*c*), in which case his Lordship decided that *Lady Pawlet* was concluded by her acts and acquiescence in constituting her separate estate part of the assets of *Lord Pawlet*, her first husband; and he emphatically observed, that facts and acquiescence were material to determine great rights and properties.

V. Having considered in prior parts of this treatise various subjects branching out of the now established doctrine, that a married woman is to be treated as a feme sole in relation to property settled to her separate use, what remains to be discussed in the present chapter will only regard her capacity of suing and being impleaded as a single woman in respect of such estate; her character as a married woman living apart from her husband by mutual agreement, upon a separate maintenance, being reserved for consideration in the next chapter.

(*a*) See *ante*, p. 220. *et seq.* (*b*) Campbell v. Walker, 5 Ves. 678. (*c*) 2 Ves. sen. 668; on this subject, see *supra*, p. 220.

It is firmly settled that a married woman cannot bind her person by any contract during the coverture (*a*), except under the special circumstances beforementioned (*b*). At law, therefore, she cannot sue or be sued without her husband being a party as before observed (*c*); and so it is in equity, this distinction being observed, that when her suit is for her separate property, her husband should be made a defendant, and she alone be the complainant under the protection of her next friend (*d*); but when she is a defendant in that Court, the suit being to establish a claim upon her separate estate, she is so far considered as a single woman, as to make it necessary to serve her personally with process in the cause (*e*).

Wife's separate character in equity in regard to proceedings by or against her.

Since the wife is liable only to the extent of her separate property in the hands of her trustees, a Court of Equity merely operates upon it and not against her personally (*f*); but as she is clothed with the character of a feme sole in regard to such estate, and her husband is a mere formal party, and the Court cannot pronounce a decree to bind her separate property without her answer, &c. so that injustice might result from allowing her an exemption from the process of contempt, it has been determined that she is personally answerable for contempts in not obeying the orders of the Court, and may be committed to prison as any other person.

Liable to answer personally for contempts of Court.

Thus in *Bell* v. *Hyde* (*g*), and *Dubois* v. *Hole* (*h*), the wife was committed to prison for not putting in an answer; and in *Stansbury* v. *Watkins*, a case at the Rolls in the year 1772 (*i*), *Sir Thomas Sewell* ordered an attachment to issue against the wife *alone*.

(*a*) *Supra*, p. 117. (*b*) *Supra*, p. 120. 124. (*c*) Marshal v. Rutton, 8 Term Rep. 547. (*d*) Griffith v. Hood, 2 Ves. sen. 452. (*e*) 9 Ves. 488. (*f*) 1 Bro. C. C. 20. (*g*) Pre. Ch. 330. (*h*) 2 Vern. 614. Ed. by Raithby. See Pannell v. Taylor, 1 Turner's Ch. Rep. 96. (*i*) Stated in notes, 2 Vern. 614.

But an order must be first obtained for her separate answer.

But in *Carleton* v. *M'Enzie* (*a*), a wife executrix and residuary legatee answered the original bill jointly with her husband, the bill was amended, and her husband went abroad; and *Lord Eldon* determined that in such a case, a previous order that the wife should answer separately was necessary to bring her into contempt for not answering the amended bill.

(*b*) 10 Ves. 442.

CHAPTER XXII.

ON SEPARATION BETWEEN HUSBAND AND WIFE.

HAVING discussed in former parts of this work the rights of husband and wife in each other's property whilst living together, their power over it, and the wife's interest as a feme sole in real and personal estates limited to her separate use, we shall lastly consider the law and equity resulting from a suspension of the marriage state by voluntary separation of husband and wife.

This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated, that, as in the other innovations upon that law, so in this instance the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities (*a*). According to the original policy of this country, the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties by voluntary compact to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in Courts of Law and Equity, that a separation *in pais* is in effect valid, and that whilst it continues the wife is to be considered in most respects a feme sole. In consequence of this departure from the common law, and

(*a*) 11 Ves. 529.

the inconsistencies between the rights and powers belonging to those two different conditions of life, originate the difficulties in dispensing justice when a married woman is permitted to assume the character of a feme sole; for a married woman is, as we have seen, disabled by policy of the common law from contracting so as to bind her person; neither can she be guilty of felony in the presence of her husband, nor can sue or be impleaded without him (*a*); she is also debarred from being a witness for or against him; so that if she were made a defendant to a bill praying no relief against her, but merely seeking a discovery, which, if admissible in evidence, would affect her husband, a demurrer would hold to such a proceeding (*b*).

Demurrer good to a bill seeking discovery from wife to affect her husband.

I shall consider the subject of this chapter under the following heads:—

I. *The* legal *effect of a separation* in pais *when the property of husband or wife is by deed vested in trustees to pay the wife a yearly sum for maintenance, distinguishing when such deed is made with a view to a* future *separation, and when with a view to an* immediate *one.*

II. *The validity of deeds of separation against the husband's creditors.*

III. *The jurisdiction of a Court of Equity in decreeing the performance of agreements for separation and for separate maintenance.*

IV. *The wife's power of alienation over her separate maintenance, its liability to her debts, and the husband's responsibility for her debts contracted during separation.*

V. *What will determine the wife's separate provision,*

(*a*) *Supra*, p. 125. (*b*) Le Texier v. the Margrave of Anspach, 5 Ves. 322. 15 Ves. 159. Barron v. Grillard, 3 Ves. and B. 165.

and her remedy when molested by her husband whilst separated from him.

VI. *The effect of separation upon the husband's right of action for his wife's adultery during the period of their living apart.*

Deeds made in contemplation of *immediate* separation good at law.

I. Every person who reads the cases on the present subject, must be forcibly struck with the difficulties which have arisen from the proposition once established, that husband and wife have the power, with or without cause, to effect a legal and binding separation through the intervention of trustees, by mutual agreement *in pais* to live apart. This, however, is established by a series of decisions, whatever may be the anomalies and perplexities which attend it. The principle has been acknowledged and acted upon in a number of instances (*a*). If, then, deeds of settlement made in contemplation of *immediate* separation be not illegal, and the provisions for the wife's maintenance may be enforced, it does not appear why a similar provision made with a view to an event which may occur, viz. the necessity of a separation at some future period during the marriage, should be more illegal or contrary to policy; for the same arguments of illegality and bad policy apply to each case, as also to all separate provisions made for married women, by rendering them independent of their husbands, and facilitating a separation between them; yet those latter provisions are valid. Such is the reasoning of *Le Blanc*, J., in the case of *Rodney* v. *Chambers* (*b*). The perplexities occasioned by the present law of separation are detailed in *Lord Eldon*'s judgment in the

(*a*) 8 Term. Rep. 521. 2 Ventr. 217. Leech v. Beer, 3 Keb. 363. 2 Bro. C. C. 90. 3 Meriv. 256. Bateman v. Ross, 1 Dow. 235. Jee v. Thurlow, 2 Barn. and Cress. 547. See Innell v. Newman, 4 Barn. and Ald. 419. (*b*) 2 East, 297.

case of *Lord St. John* v. *Lady St. John* (*a*); but the root of the evil lies in the allowance of any separation between husband and wife, except under the authority of the Ecclesiastical Court, which permits no divorce *a mensâ et thoro* except *propter sævitiam aut adulterium*; for whilst this separation *in pais* is allowed to continue, and the wife is to be considered as a feme sole during her voluntary residence apart from her husband, difficulties must occur in applying the same rules of law to her, still clothed with the character of a wife, as are applicable to single women (*b*).

(*a*) 11 Ves. jun. 529. In the case of the Earl of Westmeath v. the Countess of Westmeath, March 1820, May 1821, which came before the Lord Chancellor, on a motion for an injunction to stay proceedings at law under a deed of separation, his Lordship expressed a strong opinion against the policy of such instruments, and against the principle of the cases in which they have been held valid. The injunction was refused on the ground that the matter depended upon a legal question.

Effect of deeds of separation and covenants contained in them.

(*b*) The case of Marshall v. Rutton, 8 T. R. 545, in deciding that a deed of separation does not relieve the wife from the legal disabilities of coverture, and the case of Legard v. Johnson, 3 Ves. 352, in deciding that an agreement for a separate provision between the husband and wife alone is void, from her incapacity to contract, have removed the chief part, if not the whole, of the anomalies introduced by the previous cases on this subject. These decisions have materially qualified the effect of deeds of separation. It may be considered at present as settled, that such deeds, when not contemplating a future separation, are valid, so far as relates to the trusts and covenants by which the husband makes a provision for the wife, and the indemnity given to the husband by the trustees. See the cases, *ante*, p. 269, note. But the effect of some of the other clauses usually contained in deeds of this description is more doubtful.

Covenants not to compel cohabitation.

These deeds are generally framed with the view of enforcing the continuance of the separation, either for the lives of the husband and wife, or until they shall again mutually agree to cohabit, and for that purpose covenants are inserted to prevent any suit for the restitution of conjugal rights, and to restrain the husband from exercising personal control over the wife.

In the Ecclesiastical Courts, provisions of this description are held

In accordance with the above observations, the Court of King's Bench decided, in *Rodney* v. *Chambers* (*a*),

to be void. They form no objection to a suit for restitution of conjugal rights. See Mortimer v. Mortimer, 2 Hagg, 318.

In the Courts of civil jurisdiction, these provisions can of course have no effect as against the wife personally. Whether they can be enforced as against the husband, or the wife's trustees, is a different question. The dicta on this subject in the cases on writs of habeas corpus (cited *post*, sect. 5) have been much questioned (see 11 Ves. 532), and seem to be overruled by the principle laid down in Marshall v. Rutton, that the husband and wife cannot by agreement change their legal capacities and characters. It has been sometimes mentioned as doubtful, whether the husband's covenant not to sue for restitution of conjugal rights could be enforced by prohibition or injunction. 8 T. R. 546. 2 Cox, 107. 3 Bro. C. C. 620. 11 Ves. 533. See Butler's case, 1 Freem. 282. In Westmeath v. Westmeath, the Lord Chancellor said he believed that such an injunction had been granted in the time of Lord Bathurst, but that it was the only instance. From the manner in which the point has been spoken of, it may be inferred, that the Courts would now be unwilling to entertain this jurisdiction. In the case last referred to, his Lordship also doubted whether an action at law could be maintained against the husband upon this covenant, and observed, that if he should take the opinion of a Court of Law, that should be one of the points referred to them. In this case, a suit on the part of the husband has proceeded in the Ecclesiastical Court (see 2 Addams, 380), and it does not appear that any attempt has been made to prevent it by proceedings at law or in equity. The arguments against the policy of these covenants would apply equally whether they were made the subject of an action or an application for an injunction. The latter mode of proceeding would also be open to another objection, from the matter being merely personal, not directly affecting any right of property or pecuniary interest. See 2 Swan, 413.

In one late case, indeed, a covenant of this kind was brought before the notice of the House of Lords: how far it could be enforced did not come under consideration; but some weight appears to have been attached to it. In Tovey v. Lindsey, 1 Dow. 117, one question was, whether the wife was to be considered as domiciled in Scotland, so as to be within the jurisdiction of the Scotch Commissary Court, where her husband had sued for a divorce. She was in fact living in England apart from her husband, under a deed of separation by which he covenanted to permit her to reside wherever she should think proper. But it was contended that the husband was domiciled

(*a*) 2 East, 283.

that the husband's covenant with his wife's trustees to pay her an annuity as separate maintenance in the

in Scotland, and that the domicil of the wife was regulated by that of her husband. On this part of the case the Lord Chancellor observed, that "even if the fiction or rule of law were admitted that the forum of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts in this case, the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. He himself had agreed that their forum should be different if his wife so pleased; and then he endeavoured by this process to get rid of the effect of his own agreement."

It is now settled (notwithstanding an early case to the contrary), Turner v. Warwick, Finch. 73) that these provisions will not be enforced in equity by a decree establishing the agreement for separation personally. (Wilkes v. Wilkes, 2 Dick. 791. 3 Mer. 268). This follows equally whether the covenants be or be not binding on the husband and trustees: the effect of the decree would be to make them binding on the wife.

In a late case in the Consistory Court of London (Barker v. Barker, 2 Addams, 285), where the husband sued for a divorce on the ground of adultery committed subsequently to a deed of separation, the suit was dismissed, the Judge being of opinion that the clauses by which it was agreed that the wife might live separately, in such manner, at such places, and with such persons as she should think proper, and that the husband should not molest her in her person or manner of living, or compel her by ecclesiastical censures or otherwise to cohabit with him, or sue any persons for receiving, harbouring, lodging, protecting, or entertaining her, amounted in effect to a license to her to commit the offence of which he complained. And undoubtedly if this construction were well founded, it would form a strong objection to the validity of most deeds of separation. The cause was heard on appeal before Sir John Nicholl, and it was not necessary for him to decide the point, other evidence being adduced, which was held to prove that the deed was not made with the intention imputed to it, and the sentence of divorce a *mensâ et thoro* was pronounced. In a case occurring shortly afterwards (Sullivan v. Sullivan, 2 Addams, 299), where the language of the deed was the same, Sir J. Nicholl considered the objection unfounded: it contained, he said, only the ordinary provisions, which nearly in all cases find their way into deeds of this nature; and it was well settled that these deeds did not bar suits for divorce. See 1 Haggard, 142.

Covenants by husband to give up the custody of the children.

Deeds of separation sometimes contain a covenant on the part of the husband to resign the children of the marriage, or some of them

vent of a separation *in future* taking place between hem, with the *approbation of the trustees*, was a legal

o the care of the wife, but the legality of such a covenant has been questioned, 11 Ves. 531. On this subject see Villareal v. Mellish, 2 Swan, 533. Powell v. Cleaver, 2 Bro. C. C. 500. Colston v. Morris, 6 Madd. 89. Lecone v. Sheires, 1 Vern. 442.

It has been held in several cases, that the effect of a deed of separation is put an end to by a reconciliation, the wife being again maintained by her husband, and the object of the deed no longer existing. Fletcher v. Fletcher, 2 Cox, 99. Bateman v. Ross, Dow. 235. Jee v. Thurlow, *ubi supra*. For similar reasons it may e inferred that the same effect would be produced by a return to ohabitation compelled by the sentence of the Ecclesiastical Courts. There may perhaps be some difficulty in the application of this principle, to cases where the deed not only provides a maintenance for he wife, but makes a permanent settlement of the husband's property, giving her a future interest, as in Worrall v. Jacob, 3 Mer. 55, or where it contains provisions partly for the benefit of the hildren.

Deed of separation put an end to by reconciliation, or sentence for restitution of conjugal rights. *Semble.*

Since a reconciliation in general avoids the deed, it makes no difference in substance in this respect, whether it be framed with a iew to a separation during life, or to a separation until the parties hall agree to cohabit.

It seems that a sentence of the Ecclesiastical Court directing a eturn to cohabitation, even if not obeyed, might also prevent the peration of the deed, at least so far as to prevent it from being enforced in favour of the disobedient party. See 2 Cox, 107.

It has been observed that the legal effect of contracts relative to eparation has been considerably narrowed. In several modern ases, opinions have been expressed, that such contracts are so much t variance with the policy of the law which fixes the duties of domestic life, that it would be more consistent with sound legal principle, not to allow their operation, even in its present qualified ex-ent. 2 Bos. and Pull. 107. 8 T. R. 546. 11 Ves. 537. 3 Mer. 68. Westmeath v. Westmeath, cited *supra*.

Objections to legality of deeds of separation considered.

In considering this question, high as the authority of these pinions is, some doubt arises from contrasting them with those hich previously prevailed, and from observing that this view of he nature of the agreements in question, does not appear to have uggested itself to the Courts until a very late period. The case of eard v. Webb, 2 Bos. and Pull. 93, seems to be the first in which was intimated that such agreements ought to be deemed contrary o the policy of the law. In Legard v. Johnson, the objection turned

and valid covenant; and the Judges were unanimously of opinion, that the trustees were intitled to recover it

on different grounds. Before that time the legality of deeds o separation was constantly recognised, apparently without a sus picion of their being open to any moral or legal objection. Som favour even had been shown to such arrangements; the Court having, in order to give effect to them, gone so far as to introduc several anomalous exceptions to the ordinary rules of law. Sinc these have been overruled, it will perhaps be found that there is n inconsistency between the principles of law, and the practice as now settled with respect to deeds providing a separate maintenance fo a wife.

It may be observed, that the law does not directly prohibit husband and wife from living in a state of voluntary separation Either is intitled to compel cohabitation; but so long as both are con tented with their state of separation, there is no law to prevent o punish its continuance. The Ecclesiastical Courts do not interfer in these cases, even when the fact of separation comes judicially be fore them, unless their assistance be prayed by one of the parties. I a suit for a divorce, or for a declaration of nullity of marriage, fail the sentence is confined to a mere dismissal of the suit, not proceed ing to direct a return to cohabitation. 1 Hagg. 129. 156. 408 2 Hagg. 168. 198. 262. And the compromise of a suit for restitu tion of conjugal rights appears not to be prohibited. 2 Hagg. 320

The objection that a separation interferes with duties enjoined b morality, is one that does not arise, unless it be proved in the parti cular case, or assumed universally, that the separation has take place without sufficient cause. Whether the temporal Courts woul now inquire into the sufficiency of the cause, with a view to decidin on the legality of the deed; and whether, if they did, they woul hold no cause to be sufficient, except such as the Ecclesiastical Court admit, is still questionable. But if the temporal Courts (according to their present inclination) decline to enter, for this purpose, upo an inquiry into the circumstances which have led to the separation it would be a strong measure to assume universally that those cir cumstances could not have been such as to afford a legal or mora justification; and that the separation must therefore necessarily b inexcusable, unless it has been established by the Ecclesiastica Courts.

Even those Courts, though looking with jealousy on private ar rangements of this kind, do not act upon any such rule. When suit for restitution of conjugal rights, between parties who hav been living in a state of separation, comes before them, they do no

an action against the husband the arrears which had accrued on the annuity after separation. That such

assume that that state is unlawful, because it has been voluntary, and on that ground at once decree a return to cohabitation; but they admit the defendant to plead misconduct on the part of the plaintiff, rendering a separation necessary: and it seems that there may be cases where the circumstances, though not sufficient to found a sentence of separation *a mensâ et thoro*, may yet justify the party who has withdrawn from cohabitation, and therefore furnish a defence to the suit for restitution of conjugal rights. See 2 Hagg. 302. 313. 320, and Molony v. Molony, 2 Addams, 249. In suits for divorce, on the ground of the wife's adultery, it is expected to be shown that the husband has not cohabited with her since the discovery of her offence, and this is usually pleaded. 2 Phill. 163. So also alimony is allowed to the wife, with a view to her living separately, during the pendency of any matrimonial suit: this allowance is granted as well when she is plaintiff as when she is defendant, and at an early stage of the cause, before the grounds of her complaint have been investigated. See 2 Hagg. 199. 204. These Courts do not therefore treat a state of separation as necessarily unlawful, because it has not been preceded by their sentence.

Neither do the Courts of Law adopt any such view. The plaintiff, in an action for criminal conversation, would meet with but little success, if, after his wife's misconduct came to his knowledge, he had continued to cohabit with her, waiting till a sentence of divorce could be obtained. So, if the wife leaves her husband in consequence of ill treatment, her conduct in separating herself from him is held to be justifiable; and on this ground he is still liable for her necessary expenses. He is discharged from this liability by her committing adultery, because the law holds that such misconduct justifies him in separating from her.

Thus a state of separation, not sanctioned by the sentence of an Ecclesiastical Court, is not universally condemned by the law. It is obvious that, in a moral point of view, the sentence can make no difference. The propriety of the separation must depend upon the conduct and circumstances which have led to it.

If then the husband by deed grants an annuity for the purpose of maintaining the wife while she may be living apart from him, that purpose is not contrary to any law, nor is it necessarily contrary to any moral duty. In many instances it does only that which, under the circumstances, the Ecclesiastical Courts, if applied to, would have decreed: and the temporal Courts, in declaring a deed of sepa-

a covenant was binding seems to have been tacitly admitted by the Court of Common Pleas in the case

ration to be void, might perhaps be undoing that arrangement which the Ecclesiastical Courts would have confirmed.

The case of Bateman v. Ross, 1 Dow. 235, decided by the House of Lords, is a strong authority on this point. Disputes between the husband and wife having been referred to arbitration, an award was made, directing certain property to be given up to the separate use of the wife, during the joint lives of herself and her husband, provided they should so long live separate and apart. The award was established and enforced by the decree of Lord Redesdale, and his decree was affirmed. The Lord Chancellor said, "it was objected to the award, that it assumed the jurisdiction of an Ecclesiastical Court, and went beyond the submission, in awarding a separation. But it did no such thing. It assumed that there must be a separation, and provided accordingly." The same principles must apply to a deed not going further than to secure property to the wife during such time as the separation may continue.

If the deed, besides providing a separate maintenance, contains clauses purporting to preclude the parties from resuming their conjugal rights, these are, as we have seen, held by the Ecclesiastical Courts to be illegal, and perhaps they may be so held by the Temporal Courts: but if illegal, they do not necessarily vitiate the whole deed, as they do not form the consideration for the allowance covenanted to be paid by the husband. The indemnity, if the deed provides it, is the consideration: if not, it is held to stand upon the footing of a voluntary grant.

The objections, therefore, to the permission of deeds of separation, must rest, not so much upon any opinion of their being directly inconsistent with any part of the law, as upon grounds of policy, and arguments against their tendency; arguments which might be urged with almost equal effect against the whole doctrine of separate property, and as to which there is certainly room for much difference of opinion.

The policy of these deeds must depend, in some measure, upon the effect which the Courts of civil jurisdiction may give to those clauses which attempt to prevent either party from compelling a return to cohabitation. They may possibly hold (as indeed they have done formerly) that under some circumstances a contract for permanent separation should be held binding, the consequence of which would be to establish a peculiar and anomalous species of divorce. If, on the other hand, the views of the Ecclesiastical Courts should be adopted, and it should be held that parties cannot by their own

of *Gawden* v. *Draper* (*a*), which was considered in the last case; and the validity of the like covenant does not appear to have been doubted in *Chambers* v. *Caul-*

act abandon irrevocably the rights and duties of marriage, the consequence will be, that the deed will not furnish any means of prolonging the separation, if the proper tribunals think that it ought not to continue: it will leave open to the Ecclesiastical Courts the consideration of the question whether the cohabitation ought to be renewed, and therefore will not interfere with any rights or duties which are cognizable by law.

Whatever may be the ultimate determination of this question, it can scarcely be contended that the rule which allows deeds of separation, is in all cases productive of unmixed evil. And it may be doubted whether there is any principle of policy which requires that matrimonial disputes (unlike all others) should never be settled by private adjustment, and which renders it better to litigate than to compromise them. In cases where there has been on one side that species of misconduct, which, according to law, ought to be followed by a state of separation, the public is not injured if the guilty party acquiesces, without a judicial process, in that state which the law has declared to be right. In other cases, where the conduct has not been such as to form a ground, according to the law of the Ecclesiastical Courts, for a compulsory divorce, it is still a material question whether causes of less moment may not morally justify a separation by consent. And though the circumstances may sometimes be such as not even to afford a moral justification, it is to be remembered that the law does not undertake the task of enforcing every moral duty; and while the parties immediately concerned are satisfied, it is by no means clear that any public interest renders it necessary for Courts of Justice to interfere, and enter in each case upon an inquiry into moral conduct; an inquiry often so difficult and intricate, that any conclusion which they might arrive at would be as likely to be wrong as to be right.

The wide difference between the views of different Judges upon these points, proves that it is at least questionable whether the toleration at present allowed to voluntary separations ought to be withdrawn, and that, if any new rule be required, it is more fit that it should be introduced by a legislative enactment, than by a judicial decision founded upon individual opinions on a doubtful question of expediency.

(*a*) 2 Ventr. 217.

field (*a*), for there the deed made provision for the event of a future separation, and the husband covenanted, "that in case of future differences, and his wife should at any time thereafter find it necessary to live separate and apart from him, he would permit and suffer her to leave him, &c. *provided* the separation took place with the *approbation of the trustees* or of the survivor." And *Lord Ellenborough*, C. J., in thoroughly canvassing that instrument, instead of doubting its validity, seems to have considered it as good and binding. Upon *Rodney* v. *Chambers* being referred to in the argument, *Lawrence*, J., thus expressed himself: "in that case there was an averment that the separation was with the consent of the trustees. We thought that there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court, therefore, only decided in that case that a covenant for separation and separate maintenance with the consent of the trustees was good; *not* that a covenant was good *generally* that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights."

Hence we have the principle upon which *Rodney* v. *Chambers* was decided, declared by one of the persons who sat in judgment in it, and who continued of the same opinion as he entertained when that case was determined.

In addition to the above authorities may be adduced a case, finally decided upon this subject by the highest authority in *Ireland*, to show how such covenants as the present were considered by the House of Lords in that country before the Union.

(*a*) 6 East, 244.

The case was *Hoare* v. *Hoare* (*a*). There the wife was intitled for life to two annuities amounting to 400*l.*, which *before* her marriage were vested in trustees, upon trust that if a separation should afterwards take place between her and her future husband at her instance, the trustees should permit her to take to her separate use a *moiety* of the annuities of 400*l.* during such separation, and should permit her husband to receive the other moiety; but that if a separation took place by his means, or at his instance, then that she should receive the *whole* of the 400*l.* annuities for her separate use during the marriage. It seems that a separation took place in consequence of the cruelty and misconduct of the husband; and a bill was filed by the wife in the Court of Chancery in Ireland to enjoin the husband from intermeddling with the annuities, and to restrain the trustees from paying any part of them to him; and praying that the trustees might pay the *whole* of the annuities to the wife under the above provision in the settlement, and for a receiver. The husband stated in his answer, that he had always used his wife with tenderness and affection, and he offered to take her back, and to treat her as his wife. Upon the evidence, and the pleadings, the Court ordered a *moiety* of the annuities to be paid to her until cohabitation or further order, to commence from the time of the separation. The wife being dissatisfied with this decree, appealed from it to the then House of Lords in that country, claiming the whole of the annuities under the above settlement. All objections as to the jurisdiction of the Ecclesiastical Court, and in relation to the immorality and illegality of the agreement, were urged, and moreover that it was an agreement for a divorce instead of a marriage; and it was further contended that the husband having judicially offered to take his

(*a*) 2 Ridgeway's Parl. Ca. in Ireland, 268.

wife back again, had determined the separation. But the House of Lords were not moved by these arguments. It varied the decree, and ordered the *whole* of the annuities to be paid to the wife until she and her husband should cohabit, or till the further order of the Court below.

It may be inferred from *Lord Hardwicke*'s judgment, in *Moore* v. *Moore* (*a*), that he considered such an agreement *in prospectu* to be valid; and a like inference may be drawn from *Lord Vane*'s case (*b*), in which, a separation having taken place, the husband and wife agreed to cohabit; and by articles entered into on *that* occasion, he covenanted, that if she desired to live apart he would not molest her. After these articles were concluded, cohabitation took place, but, in consequence of ill treatment, the husband and wife separated a second time, and she having exhibited articles of the peace against him, the Court considered, that, under the circumstances, and the agreement providing such future possible separation as above (the validity of which was not questioned), the wife was intitled to security.

Yet *semble* that such deeds would not now be supported.

Such are the authorities to be adduced in favour of the validity of settlements containing provisions for future contingent separations. But since the unequivocal opinions of modern judges appear to be that the Courts have already proceeded too far, consistently with policy and morality, in establishing deeds of separation, and as the case of *Rodney* v. *Chambers* (the principal one upon this subject) is considered by the profession as virtually over-ruled by the decisions of *Abbott* and *Dallas*, Chief Justices, in the year 1819, on a writ of error in a case of *Durant* v. *Titley* (*c*) (differing, how-

(*a*) 1 Atk. 277, stated *supra*, p. 135. See also Nicholls v. Danvers, 2 Vern. 671. (*b*) Stated 13 East, 171, in notis. 2 Strange, 1202.

(*c*) 7 Price, 577. In this case the effect of the deed was to pro-

ever, from the former case in this particular, that the future separation was not made dependent upon the consent or approbation of the trustees), it may be considered that a deed or settlement providing a separate maintenance for a wife, or an intended wife, in the event of future separation, either with or without the consent of trustees or other persons, is a provision which will not be enforced either at law or in equity.

When husband and wife have resolved to separate and live apart, then, since she cannot by law contract with her husband, it is necessary that the provision agreed to be allowed by him on that occasion, should be either vested in trustees, or secured by his covenant with them. And, in order to support the provision against his creditors, the transaction must be supported by a *valuable* consideration, as the covenant of the wife's trustees to indemnify him against her debts (*a*). But if there be no creditors, the husband himself will be bound (*b*). This introduces the subject proposed

vide a separate maintenance for the wife, whenever she should be living apart from her husband, leaving it to her to separate from him at pleasure. In Rodney v. Chambers, the deed was made as an inducement to a reconciliation after some differences had arisen, and it provided a separate maintenance for the wife, only in the event of a future separation with the approbation of the trustees. The cases are, therefore, distinguishable; and in Jee v. Thurlow, 2 Barn. and Cress. 551, Lord Chief Justice Abbot stated that, in deciding Durant v. Titley, it was not intended to shake any former decision. It was different, he said, from the former cases, as the deed provided for the future separation of a husband and wife who were living together at the time. Mr. Justice Bailey observed, that in Rodney v. Chambers, the intervention of impartial persons was required to decide whether sufficient cause of separation did or did not exist; and seems to have thought (in conformity with the opinion of Mr. Justice Lawrence, cited *ante*, p. 278), that it was not illegal to refer such questions to the decision of a domestic forum; an opinion which is in some measure sanctioned by the cases of Soillieux v. Herbst, 2 Bos. and Pull. 444, and Bateman v. Ross, 1 Dow. 235.

(*a*) For the form of a deed of separation, see Append. No. 19.

(*b*) 2 Atk. 511.

secondly to be considered, viz.: the validity of deeds of separation against the husband's creditors.

The same rules apply to these as to other *post*-nuptial settlements.

II. With respect to settlements upon the wife made on mutual agreement between her and her husband to live apart, since these provisions are made *during* the marriage, what has been before said in regard to settlements made *after* marriage (*a*), also apply in general to those now under consideration (*b*).

If, therefore, a settlement be merely in consideration of an agreement between husband and wife to live separate, it will be void against creditors and purchasers, the statutes of the 13th and 27th of Elizabeth extending to such a deed and to such a consideration.

Thus, in *Fitzer* v. *Fitzer* (*c*), *A*, the wife of *B*, being intitled to an annuity of 50*l.*, she and her husband agreed to live apart; and *B* covenanted with trustees, in a deed of separation, to allow *A* a separate maintenance of 14*l. per annum* out of his own estate, and 24*l.* a year more out of her said annuity, also 12*l.* to his daughter by her. In order to secure these payments, *B* assigned the annuity to the trustees. The husband afterwards took the benefit of the then insolvent debtors act; and in a suit by *A* and her daughter against *B*, and a creditor of his subsequently to the deed (who was also assignee under the act) to have the trusts of the deed performed, *Lord Hardwicke* declared that the deed was void against the creditor, but good against the husband.

And they are good against creditors, &c. when made for a valuable consideration, as if husband be indemnified against wife's debts.

Similar to other settlements *after* marriage, and before considered, these provisions upon separation may

(*a*) See vol. i. p. 303, *et seq.*

(*b*) Hence an arrangement as to the wife's property contained in a deed of separation is void as against her, and cannot affect her title by survivorship to a contingent interest falling into possession after her husband's death. Stamper v. Barker, 5 Madd. 157.

(*c*) 2 Atk. 511.

be obligatory upon creditors and purchasers when made for *valuable* considerations. Accordingly if a person, or trustees, covenant with the husband to indemnify him against his wife's debts, the settlement will be good against his *then* present or *future* creditors, and also against subsequent purchasers.

Thus, in *Stephens* v. *Olive* (*a*), *A* was intitled to certain real estates for life, subject to a mortgage for 500*l.*, and he and his wife agreed to live apart; *A* therefore conveyed his life-estate to trustees; first, to keep down the interest of the mortgage, then to pay taxes, &c. and, finally, an annuity of 35*l.* to *B* as separate maintenance. The trustees covenanted to indemnify *A* against the debts which *B* might contract *after* the separation. The trustees entered into possession of the premises, and afterwards a judgment was obtained against *A*. The creditor instituted the suit to set aside the settlement as being *voluntary*. But *Lord Kenyon*, M. R., was of opinion that the settlement was good, and declared that the covenant by the trustees to indemnify the husband against the debts which the wife might contract after the separation was a valuable consideration, and supported it, although it was made *after* the debt due to the plaintiff was contracted. Again,

In *Worrall* v. *Jacob* (*b*), *A*, a trader liable to the bankrupt laws, and *B*, his wife, executed a settlement after marriage, by which the estate in question, originally her property, stood limited in default of issue of their bodies to the survivor of them in fee. A separation afterwards taking place between them, *A* covenanted with a trustee, in a deed of separation to pay to *B* an annuity of 70*l.*, and to convey his con-

(*a*) 2 Bro. C. C. 90. King v. Brewer, in a note to that case, p. 93. S. P. See also p. 386, in the same volume. (*b*) 3 Meriv. 256.

tingent estate in fee to such persons as *B* should by deed or will appoint. The trustee, on his part, *covenanted* to indemnify *A* against *B*'s debts, and against any demand for *alimony* which she might at any time make. *B* made an appointment in favour of the plaintiffs. *A* survived *B*, and became a bankrupt and died. The question was between the appointees of the wife, and the assignees of the husband. And *Sir William Grant*, M. R., determined that the covenant by the trustee being founded upon a *valuable* consideration, supported the deed of separation against the assignees.

Or if the wife relinquish the title which she may have to alimony in the Ecclesiastical Court.

It is observable, in the last case, that the covenant extended its indemnity to the wife's claim of *alimony* in the Ecclesiastical Court, and it seems that, in instances where there is no indemnity to the husband against the debts which the wife may contract, yet if, from his cruelty or other misconduct towards her, he give her a title in that Court to separation and alimony, then the consideration of the wife not prosecuting such her right, but consenting to accept amicably of a settlement in lieu of such alimony, will support the transaction against creditors and purchasers.

Accordingly, in *Hobbs* v. *Hull* (*a*), the husband (the defendant) being indebted to the plaintiff in judgments and otherwise, a separation took place between him and his wife; upon which occasion he settled part of his real estates, to the yearly amount of 300*l.*, upon his wife for separate maintenance, and on the children of the marriage. It appeared that, previously to the separation, the husband had lived in a state of *adultery;* and it was insisted, in answer to the bill filed by the judgment creditor to set aside the settlement as voluntary, that since the wife was, in consequence of her husband's

(*a*) 1 Cox Rep. 445.

misconduct, intitled to a divorce *a mensâ et thoro*, and consequently to an allowance for alimony, her acceptance of the provision by settlement in lieu of alimony was a valuable consideration, which supported the deed against the husband's creditors. And so it was determined; the Master of the Rolls thus expressing himself: "I am now bound to decide the question, whether the husband having behaved so ill as to intitle his wife to obtain a divorce in the Spiritual Court *a mensâ et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meet the husband on the threshold, and say she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration, when the wife in this case agrees to accept this settlement, instead of resorting to enforce her right in the Ecclesiastical Court; surely she is giving up something for it. I am therefore very clearly of opinion, that this is not one of those agreements which the statute of Elizabeth meant to prevent. I do not go upon any motives of compassion, when I decree as I am now about to do, not upon the conduct of the parties, but upon the *rights in law*, which I take to exist between them. And I shall dismiss this bill with costs as to all parties but the husband, and as to him without costs."

The principle of the last case was recognised by the Court of King's Bench, in *Nunn* v. *Ladbrooke* (*a*).

In that case the husband received 1800*l.* with his wife, his own property being about 200*l.* only. He contracted several debts, and having used his wife with *great cruelty*, they agreed to live apart, under a deed of separation, by the terms of which he, in consider-

(*a*) 8 Term Rep. 521.

ation of 200*l.* lent by *A*, and paid to the husband on the part of the wife, and of the agreement to live separate, and in order to make provision for her, assigned to trustees all the farming stock belonging to his farm at *P* (which farm he proposed to quit and assign in consideration of the 200*l.*), cattle, corn, &c. household goods and furniture, chattels and effects, upon or belonging to the farm, or wherever else the same might be, together with his interest in the lease, and all debts then owing to him, in trust, at the discretion of his trustees, either to carry on the farming business, or to sell his property and collect his debts, &c.; and with the proceeds (after deducting the expenses of sale, &c. and repaying *A* the 200*l.* advanced by him, with all other monies due to him by the husband), in trust to pay all or such part of the husband's debts as they should think proper, and the residue or surplus to the wife for her separate use and disposal. The trustees entered upon their trust immediately after the execution of the deed, sold the greater part of the goods, &c. and, after a proper advertisement, paid all such of the husband's creditors as sent in their demands twenty shillings in the pound, after which there remained a balance of 329*l.*: 19: 1, exclusive of some articles bought in by one of the trustees, and enjoyed by the wife on the farm, of the value of 111*l.*, and of the lease of the value of 500*l.* After the separation the wife resided constantly upon the farm, and received the produce or profits by the hands of the trustees. About *two months* after the execution of the deed, the husband became a bankrupt, and having died intestate, the assignees sued the wife as *executrix de son tort*, so that the question for the Court to decide was, whether the deed of separation was or was not void against the subsequent creditors of the husband? And the Court was of opinion that it was good, as being neither fraudulent nor voluntary. And *Lord Kenyon* observed (amongst other things), "that very

small considerations had been holden sufficient to give validity to a deed, where, in framing family settlements, limitations were made in favour of the distant branches of the family. Such remainders were not considered voluntary if the object of the parties making the settlement was fair and honest: but that the present was a much stronger case; for here there was an *immediate* consideration; independently of the provision for the husband, *he was relieved from the consequences of a suit in the Spiritual Court.*" The other judges coincided in opinion with his Lordship.

Courts of Equity will not enforce an agreement for separation.

III. With respect to the jurisdiction of Courts of Equity upon the subject of separation *in pais*, it may be considered as a general rule that they will not infringe upon the jurisdiction of the Ecclesiastical Court by enforcing the performance of a mere personal contract entered into between husband and wife to live apart (*a*). In *Worrall* v. *Jacob* (*b*), this was considered by *Sir William Grant*, M. R., to be settled; and in *Wilkes* v. *Wilkes* (*c*), the husband by deed agreed that his wife should live separate from him; but *Sir Thomas Clark*, M. R., refused to carry such agreement into execution, saying, that such a subject was not within the province of a Court of Equity. Indeed, whether the contract be executory as resting in articles, or be complete as by deed, and the trusts declared, the Court will not decree the performance of an agreement or covenant for the separation of husband and wife (*d*).

Yet they will oblige the husband to perform his agreement to pay separate maintenance.

But notice must be taken of an anomaly which has arisen out of the modern species of divorce, that seems to set reason and principle at defiance. It is the doctrine now established, that although the Court will not in direct terms decree a separation between hus-

(*a*) Vide *ante*, p. 272. (*b*) 3 Meriv. 268. (*c*) 2 Dick. 791. (*d*) 3 Atk. 550.

band and wife, yet that it will do so indirectly by compelling the husband to perform his agreement to pay separate maintenance. *Sir William Grant*, in the above case of *Worrall* v. *Jacob*, noticed the singularity, and after alluding to the Court's refusal to carry into execution articles of separation between husband and wife, proceeded thus: "it should seem to follow that the Court would not acknowledge the validity of any stipulation that is merely accessary to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife, and it does seem rather strange, that the *auxiliary* agreement should be enforced, while the *principal* agreement is held to be contrary to the spirit and policy of the law. It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of, and relate to, that unauthorized state of separation in which the husband and wife have endeavoured to place themselves. I am, therefore, only to repeat what *Lord Eldon* has said in the case of *Lord St. John* v. *Lady St. John*, viz. 'if this were *res integra* untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject.'"

The cases, however, have established the distinction between a decree for a separation and one for maintenance under the husband's agreement, as will more fully appear from the cases after stated.

As to Courts of Equity decreeing performance of husband's

It has been observed that a married woman is by law unable to contract with her husband or any other person. A Court of Law, therefore, cannot interfere to compel payment by the husband of an allowance

stipulated to be made to his wife upon an agreement between themselves without the intervention of trustees. It may then be inquired whether a Court of Equity will decree the performance of such an engagement by the husband upon his and his wife's mutual agreement to live separate, when the contract is between them alone, and is merely executory? If the answer were given upon consideration of actual decisions, without regard to dictum upon dictum not amounting to decision, there would be no difficulty. The answer might be this; the Court, when called upon to act on behalf of the wife to compel her husband, *after* separation, to perform his part of his agreement with her, viz. to pay her the maintenance which he engaged to do, would so decree regardless of there being no trustees who were parties to the agreement, an omission which, as has been before observed, the Court has held not to be an insuperable objection to a wife taking property either from her husband or a stranger (*a*); for it being once established that settlements made in consideration of mutual agreements to live separate are valid, (and that they are so cannot be disputed, if case upon case have the effect of settling the law), it follows, that the husband must be bound by his stipulations; and it seems to be immaterial in equity whether he agree with a trustee or herself to allow her maintenance, or whether there be or be not any consideration for the provision, except that of the agreement to live separate so far as the obligation of the husband is in question. And with respect to the objections of policy and inconvenience, it is presumed that it is not reasonable to confine them exclusively to this case so as to prevent the interference of the Court; since the same objections are equally applicable to instances where the agreements are made with the wife's trustees,

agreement for separate maintenance when such agreement is between himself and wife only.

(*a*) *Supra*, page 152.

notwithstanding which the Court's interposition is now settled and of frequent occurrence. But this reasoning is inapplicable when either the husband or wife apply to the Court for an appropriation of the produce of her property as maintenance, in order to enable her and her husband to carry into effect their *intentions* of separation; because that would almost amount to a direct decree for a separation, which has been shown not to be within the province of a Court of Equity. Besides, the Court would not give its sanction to the wife's parting with her property upon such a consideration. This appears to have been *Lord Thurlow*'s opinion, in *Durand* v. *Durand* (*a*).

In that case, a separation having been agreed upon, which afterwards took place, the terms were, that of 6050*l.* bank annuities, the wife's separate property, 1500*l.* should be paid to her and the residue to her husband, which the wife said she was desirous of parting with for the *sake of living separate.* The Chancellor said, he could not find himself justified in interfering in any manner in a business of *that sort*, where the wife was clearly intitled to the whole, but acceded to the terms of giving up two thirds *for the sake of the separation;* his Lordship therefore dismissed her bill filed to accomplish the above object (*b*).

To the principle of a Court of Equity declining to do any thing which may tend to the continuance of a divorce between husband and wife under their mutual

(*a*) 2 Cox Rep. 207.

(*b*) Probably the unreasonable terms upon which the agreement was made, influenced the Court in declining to interfere: the report states, that *on other terms being agreed to on the part of the husband,* his Lordship dismissed the bill. In other cases the Court has carried into effect deeds by which the wife has given up part of her separate property to her husband, on the occasion of a separation. Wilkes v. Wilkes, 2 Dick. 791. More v. Ellis, post, p. 294. See Bright v. Chapman, 2 Anst. 345, post, p. 299.

agreement to live apart, when the husband is under no obligation to allow separate maintenance, may be ascribed the decision of the case of *Duncan* v. *Duncan* (*a*); by which the Court refused to decree to the wife separate maintenance out of her own property whilst she lived apart from her husband by their mutual consent, no improper conduct being imputable to him, and she not being destitute of all provision.

The case was to this effect. The wife at the time of her second marriage was intitled, under the will of her first husband, to a part of his personal estate vested in trustees, and also to 3000*l.* in her own right. The latter sum was settled upon her in contemplation of the second marriage, but her second husband made no provision for her out of his own property. They by mutual agreement lived apart, the reasons for which did not appear. During the separation, the wife by bill in equity prayed a settlement to her separate use of the property to which she was intitled under her former husband's will. But *Sir William Grant*, M. R., dismissed the suit, observing, that the *only* facts were, that the husband and wife did not live together, the cause of the separation not appearing; and that no provision for her was made by him in addition to the settlement. Upon such a state of facts, his Honor said, that he did not find any instance in which the Court had ever decreed *separate maintenance* to the wife either out of her husband's property or her own; that the cases in which the Court had interfered were, where the husband had been guilty of cruelty, or turned his wife out of doors, or quitted the kingdom without making any provision for her, but that where the case went no farther than that *merely* of husband and wife living apart, he could find no authority for decreeing separate maintenance to her, still less for making any

(*a*) Coop. C. C. 254. 19 Ves. 394.

addition to what had been already settled upon her (*a*).

Separation by mutual agreement will not exclude husband's title to wife's accessional fortune upon his making an additional settlement.

In the last case it is observable, that the property in question belonged to the wife *when* the settlement was made; a circumstance which, it is presumed, distinguishes it from the case of *March* v. *Head* (*b*), next stated; and it is conceived that *Sir William Grant* did not intend to decide, that if an accessional fortune came to the wife *during* the separation, she was not intitled to a settlement out of it.

In *March* v. *Head*, last referred to, the wife had 1000*l.* to her fortune, and no other provision under articles before marriage than her husband's covenant that he would consider himself as a freeman of *London*, and that if she survived him she should have such a share of his personal estate as belonged to the widow of such a person. *They lived separate.* Upon the deaths of her father and mother she, as their next of kin, became intitled to 1800*l.* more, and an application was made on her behalf for a further provision in consequence of this additional fortune. And *Lord Hardwicke* was of opinion that she was intitled to such a provision, and referred it to a Master, to receive proposals from the husband for a further provision on behalf of the wife, in proportion to the 1800*l.*

The above case shows that a mutual separation by consent will not deprive the husband of his right to the personal property which may accrue to his wife whilst they continue in that state, upon the terms of his making a provision for her out of it.

Doubts expressed on validity of agreements of separation entered into between husband and wife alone.

Lord Rosslyn, in the case of *Legard* v. *Johnson* (*c*), and *Lord Eldon*, in *Lord St. John* v. *Lady St. John* (*d*), expressed strong doubts upon the validity of a con-

(*a*) As to separate maintenance, see vol. i. p. 278, *et seq.*
(*b*) 3 Atk. 720. And see vol. i. p. 296. (*c*) 3 Ves. 352.
(*d*) 11 Ves. 532.

tract entered into between husband and wife alone to live separate, and consequently of the Court's jurisdiction to enforce that part of it by which the husband engaged to pay her a separate allowance. The latter judge observed, in the case last mentioned, that the question had never been put upon the contract of the husband and wife; but that the Court had always put it upon the contract between the husband and the trustee, from the covenant of the trustee to indemnify the husband against her debts. Hence *Lord Eldon's* opinion, always of great weight, but in this instance not a decision, seems to be that the Court ought not to decree the husband to allow maintenance upon his agreement with his wife to pay it (*a*), and not even when the contract is made between him and her trustee, unless the husband be indemnified against her debts.

(*a*) The same opinion was expressed by the Vice Chancellor in Elworthy v. Bird, cited *post*, p. 298, and it seems now to be clear that a Court of Equity will not perform a mere agreement between the husband and wife, by which the former is to pay a separate maintenance to the latter. The wife being unable to contract, the agreement is without consideration. The same observation applies to cases where the agreement is made with a trustee, but without an indemnity or other consideration. In several former cases, such as Head v. Head, and Guth v. Guth, it seems to have been considered that the wife, though unable to contract for other purposes, was competent to contract with her husband for the purpose of a separation, an opinion, the inconsistency of which has been forcibly pointed out in Legard v. Johnson, and St. John v. St. John.

The question would admit of a different view, if the wife was possessed of separate property; and agreed to relinquish or settle it: this might be a consideration for the husband's agreement.

But although a mere agreement for a separate maintenance cannot be supported without a legal consideration, the case is different, if the husband has secured it by a deed conveying an estate, or a bond giving a legal right of action to the wife's trustee. The want of a consideration is not then material, as between the parties; and a Court of Equity will, if necessary, assist the wife by compelling the trustee to enforce the security against the husband for her benefit. Seagrave v. Seagrave, 13 Ves. 439.

His opinion, with that of *Lord Rosslyn*, is of much importance; as whatever may be the conclusion to be drawn from actual decisions upon this subject, those opinions must have the effect of producing uncertainty as to what future decisions may be in cases where the above ingredients are wanting. The authorities I shall now advert to, including such cases as rest merely in agreement between the husband and wife, as also those where the contract was between him and a third person acting for the wife, and where the husband has been indemnified against her debts, and when no such indemnity occurred.

Cases considered in which Courts of Equity have assumed jurisdiction upon articles of separation between husband and wife alone.

1. The cases first to be considered are those which relate to agreements for separation entered into between husband and wife alone.

In *More* v. *Ellis* (*a*) the wife had abandoned her husband, and during her elopement became possessed of considerable property, which was vested in trustees for her separate use and disposition. The husband having met with her, took possession of her person; and on the following day articles of agreement were entered into between them, by which in consideration of his permission for her to live apart, she engaged to settle upon him 200*l.* a year for life, and to pay him 1000*l.* out of her *separate* estate. Upon the bill of the wife to be relieved against, and the bill of her husband for a performance of the articles, the Court of Exchequer, after an issue at law, finding that they were voluntarily executed by the wife, confirmed the transaction (*b*).

This case affords two inferences: first, that the

(*a*) Bunb. 205. 1 Bro. Parl. Cas. 237, Ed. Toml.

(*b*) The decree declared that the articles were well executed by the wife pursuant to the power vested in her by the will of her father: they took effect as an appointment, and the case is therefore distinguishable from those where there has been merely an agreement.

Court considered there was no objection to the transaction on the ground that it rested in articles only between husband and wife; and secondly, that the Court, if there were no undue influence, would enforce the wife's engagements in regard to her separate estate through the medium of her trustees, since she was competent to dispose of it as a feme sole; this case differing from that of *Durand* v. *Durand* (*a*), before stated, in the following particular, viz. that in the present instance it is to be presumed that the separation *had* taken place upon the faith that the articles would be performed, but in that case the *separation depended* upon the Court enabling the wife by a disposition of her separate estate to perform her part of the agreement for a separation then intended and which had not taken effect.

The next and only case that I have been able to find upon this subject is *Guth* v. *Guth* (*b*), the authority of which, although doubted, has not yet been over-ruled. It is an express decision by *Lord Alvanley*, after great research and consideration, that a Court of Equity will assume jurisdiction and enforce the husband's contract entered into with his wife alone, and compel him to pay the maintenance which he stipulated to allow on their agreement to live separate.

The husband and wife having resolved to live apart, the terms, as agreed upon between them, were contained in a deed poll signed by the husband, by which he stipulated to allow, pay, or cause to be paid to his wife 100*l.* a year for life, for the maintenance of herself and her child; and if she contracted debts without his consent which he should be compelled to pay, the agreement was to be void. The annuity being unpaid, the wife filed a bill for recovery of the arrears;

(*a*) 2 Cox, 207, *et supra*, p. 290. (*b*) 3 Bro. C. C. 614.

and the Court decreed payment, after an examination of almost all the prior cases.

This unsettled point must be now left to the judgment of the reader, until the last case shall be either confirmed or repealed by a solemn adjudication. In appreciating the degree of authority to be given to that case, he will remember the patient industry and great knowledge of the Judge who decided it, and that he made his decree after the inconvenience which might arise in consequence of the jurisdiction of the Ecclesiastical Court had been pressed upon him (*a*).

Cases on agreements of separation between husband and a *truskee* for the wife, when no indemnity was given to husband against her debts.

2. The second class of cases are those where the contract was between the husband and a third person acting for the wife, and no indemnity was given to the husband against his liability to pay his wife's debts.

Upon this subject it will appear from the cases next stated, that the wife has precisely the same right as any other *cestuique trust*, to call for the execution of a trust created in her favour. It is a consequence from this proposition that whether the deed of separation securing to her maintenance be purely voluntary, or be supported by a valuable consideration, as the covenant of her trustee to indemnify the husband against her debts, she will be intitled in either case to call for an execution of the trust (*b*).

Turner v. *Warwick* (*c*) is a case where the agreement was between husband and wife for a separation, which agreement was completed by a deed demising lands to trustees in trust to apply the rents in payment of an annuity of 300*l.* for the wife's maintenance. In a suit by the trustees against the husband and the tenants of the premises, *Lord Nottingham*, with the

(*a*) On this point see Pre. Ch. 498. (*b*) 13 Ves. 443. 18 Ves. 99. (*c*) Finch, Ch. Ca. 73; and see Fitzer v. Fitzer, 2 Atk. 511, and stated *supra*, p. 282.

consent of the parties, ordered all arrears to be paid; and further, that the husband should not molest his wife in her person, nor interfere with any goods which she should acquire.

It does not appear that the husband was indemnified against his wife's debts, and it is to be presumed that if for any reason this transaction had been illegal or improper, his Lordship would not have made the above decree even with the consent of the parties.

In *Angier* v. *Angier* (*a*) (which it may be inferred from the decree did not contain any indemnity to the husband against his wife's debts), the husband by articles agreed with a trustee to allow his wife *52l.* a year, and to permit her to live where she thought fit without molestation. This agreement was made while a suit by her was pending in the Ecclesiastical Court for separation and alimony. The allowance being in arrear, she filed a bill for the payment of it, and the Court so decreed.

Head v. *Head* (*b*) also falls within this class of cases. There a separation took place, and during its continuance the husband wrote a letter to *B*, the wife's father, agreeing to pay to her 400*l.* a year quarterly so long as they should *continue* separate. The allowance being in arrear, she instituted a suit to recover it, which *Lord Hardwicke* decreed to her (*c*).

(*a*) Pre. Ch. 496. (*b*) 3 Atk. 547, 551; and see Fletcher v. Fletcher, 2 Cox, 99. Cooke v. Wiggins, 10 Ves. 191, and Seagrave v. Seagrave, 13 Ves. 439.

(*c*) In this case Lord Hardwicke made an order on motion for the husband to pay 400*l.* to the wife to maintain her till the hearing of the cause. 3 Atk. 295.

Similar orders were made by Lord Bathurst in Yea v. Yea, (shortly reported in 2 Dick. 498). A separation had taken place, and the husband had by deed and bond secured to the wife an annuity charged on his estates, and the sum of 500*l.* to enable her to pay her debts: having afterwards refused payment, an action had been

Courts of Equity have undoubted jurisdiction when husband is indemnified against wife's debts.

3. It having been established by the cases last stated and referred to in the notes, that the Court will execute a voluntary agreement of the husband entered into with a third person to allow his wife maintenance upon their separation (*a*), *a fortiori*, the Court must do so when the husband receives a *valuable* consideration for such his engagement, as the covenant of a trustee to indemnify him against his wife's debts. Some of the cases upon this subject are mentioned below (*b*).

[In *Elworthy* v. *Bird*, 29th June, 1825, the bill filed by the wife and her trustees prayed a specific performance of an agreement, to execute a deed of separation, securing an annuity to the wife and indemnifying the husband against her debts. The husband put in a demurrer, which was argued before the Vice Chancellor. His Honour gave judgment for the plaintiffs. He observed, that it was very true as a general proposition, that a Court of Equity would not specifically perform an agreement for a separation between an husband and

brought against him on the deed and bond in the Court of King's Bench, and a verdict obtained: he brought a writ of error, and filed a bill in the Court of Exchequer for an injunction to stay the proceedings in the action. The bill in Chancery was filed by the wife to recover the amount due to her, and to have a receiver appointed. On a motion made after answer, it was ordered that the husband should in a month pay to the wife the sum of 500*l.* towards her support and maintenance, and to enable her to carry on and defend any suits relating to the matters in question: this was to be without prejudice, and subject to the further order of the Court, 24th Jan. 1774. Reg. Lib. B. 1773, fo. 129.

The wife afterwards moved, that a further sum of 1000*l.* might be paid to her by the husband, or that a receiver might be appointed to receive the rents of his estates for the purposes of the deed of separation, and to pay the sums due to her. An order was made in terms similar to the former order, directing a further advance of 600*l.*, 19th July, 1774. Reg. Lib. B. 1773, fo. 244. See 1 Atk. 277. 2 Bro. P. C. 24.

(*a*) Sed. vid. *ante*, 293, note. (*b*) Seeling v. Crawley, 2 Vern. 386. Stevens v. Olive, 2 Bro. C. C. 90.

wife, for in truth the wife was incapable of entering into such an agreement. But on examining all the authorities, it appeared to him, that although some little doubt had been suggested on the point by some Judges, it had been uniformly decided, that when trustees entered into an agreement to indemnify the husband against the debts of the wife, that was a sufficient consideration for the allowance stipulated to be paid by the husband, and Courts of Equity had never refused to perform such an agreement.]

When the property the subject of agreement on separation is the wife's.

4. The authorities which have been stated in this chapter, with the exception of *More* v. *Ellis*, and *Durand* v. *Durand* (*a*), are instances where the property belonged to the husband. In the two excepted cases the property was the wife's, as it also was, either wholly or in part, in the cases next stated and referred to, and no objections were taken to the validity of the transaction on that account (*b*).

In *Fitzer* v. *Fitzer* (*c*), the wife's maintenance was provided out of the joint estates of her and her husband.

And in *Bright* v. *Chapman* (*d*), by articles of separation the husband covenanted not to molest his wife, and he was to receive an annuity out of *her* property, which had been assigned to trustees. Upon his bill for payment of the annuity out of the wife's estate, and after a defence that he, contrary to his engagement, had molested his wife, the Court of Exchequer directed an issue to ascertain that fact; which it is presumed it would not have done if the articles had been considered not obligatory, either from the circumstance of the wife being to receive no maintenance from the husband, or of his being to receive a benefit out of her property.

Probable rule on this subject.

This question may probably be thus considered:

(*a*) Bunb. 205. 2 Cox, 207.
(*b*) *Ante*, p. 293, note *a*.
(*c*) 2 Atk. 511, stated *supra*, p. 282.
(*d*) 2 Anstr. 345.

Since a married woman may dispose of personal property limited to her separate use as a feme sole, and may even give it to her husband, there appears to be no reason why she should not be competent to make it the subject of settlement upon a mutual agreement between her and her husband for a separation. And with respect to her other property not so circumstanced, if it have been reduced into possession, or being in action if it be assigned to trustees, with the consent of the wife and the concurrence of her friends, upon the trusts of the articles of separation (*a*), it is presumed that her estate will be bound by the trusts (*b*): in the first case, because by the reduction into possession it became the husband's property and liable to his disposition; and in the second case, since the settlement was made with due regard to the wife's interest, and with the concurrence and agreement of her friends on her behalf (*c*), and she might by consent in Court have given the whole fund to her husband (*d*), if *after* the separation, she or her husband be obliged to apply to the Court to subject her estate to the trusts of the deed or articles of separation, it should seem that the Court would act upon her consent as to the application of the property. But in the absence of *modern* authority upon this latter point, and considering the aver-

(*a*) See the last case.

(*b*) But see Stamper v. Barker, 5 Mad. 279, cited *ante*, p. 282, note, from which it appears that a separation deed cannot bind the property of the wife, if not settled to her separate use. So far as it is her deed, it is inoperative, on the ground of her coverture, and the concurrence of her friends cannot give it any additional effect. Her property is, therefore, not affected by it, unless reduced into possession during the coverture.

(*c*) See Lannoy v. Athol, 2 Atk. 448, and the inference deducible from Lord Hardwicke's judgment: the case is stated *supra*, vol. i. p. 303. *Note by the Author.* (*d*) *Supra*, vol. i. p. 265.

sion of Courts of Equity to interfere in those cases, this may be considered as a point unsettled.

Wife's equities when her trustees refuse to act, or the deed of separation is lost.

It is a consequence of what was before stated in regard to the wife's right to call for the execution of the trust declared in her favour in a deed of separation, and to the same equity in all respects as any other *cestuique trust*, that if her trustees refuse to act, or the deed has been destroyed, she, in the one case, will be intitled to have the trust performed, and in the other to have the loss of the instrument supplied.

Accordingly, in *Seagrave* v. *Seagrave* (*a*), upon the separation of husband and wife, he executed a bond to a trustee for payment to her at the house of *B* of an annuity of *5s.* a week during his *life;* but she was to be permitted to live where she pleased. The bond was burnt by the trustee with the husband's privity and consent, and a bill was filed by the wife for arrears of the annuity, and for the execution by her husband of another bond to a new trustee. The husband in defence insisted upon the circumstances of her leaving the house of *B* where she resided, and living in adultery, both of which facts were proved. And *Sir William Grant*, M. R., after remarking that adultery was no bar to the wife's demand (*b*), directed that she should be at liberty to bring an action in her trustee's name upon the bond, the destruction of which was admitted in the answers of the husband and of the trustee; his Honor observing, that the question which had been made between the parties with regard to the real tenor of the condition would be open, and that it was more fit that such question should be investigated at law than in that Court.

Adultery of wife after separation no bar to her separate allowance.

So also in *Cooke* v. *Wiggins* (*c*), the husband gave a bond to a trustee for payment to his wife of *30l.* a

(*a*) 13 Ves. 439. (*b*) See post, sect. 5. (*c*) 10 Ves. 191.

year during their separation. The annuity having fallen in arrear, the trustee refused to enforce the bond without an indemnity. The wife, therefore, instituted a suit for payment of the arrears, and also to have the future payments secured, and a fund appropriated for the purpose. But the same Judge, although he decreed payment of the arrears, declined ordering an appropriation, assigning as a reason, that a man by granting an annuity did not engage to bring into Court a sum of money sufficient to answer it; and he observed that the very principle of granting an annuity was that the grantor might be able to pay by degrees what he had no means of paying at once.

But the Court will not order an appropriation to secure payment of wife's separate provision.

Apportionment.

The motive of the husband in making a separate allowance to his wife upon their separation by mutual agreement, being for her support and maintenance, it is a necessary consequence that such allowance will be *apportioned* upon the death of the wife between the last and accruing times of payment. This was done at law in the case of *Howell* v. *Hanforth* (*a*).

In that case a bond was given by the husband to his wife's trustee to pay her 80*l.* a year quarterly. He also gave a warrant of attorney to confess a judgment on the bond. The judgment was entered up, and writs of *fieri facias* were sued out at different times, all of which were satisfied except the last, which was for 78*l.*; in regard to which it was ordered that it should be set aside on payment of all arrears and costs, and that the judgment should stand as a security for *future* arrears, with liberty to apply to the Court to sue out fresh executions. The wife being dead, leave was asked to take out execution for the *proportional* arrears of the annuity between the last quarter day of payment and the death of the wife; and the Court granted the

(*a*) 2 Blackst. Rep. 843, 1016. See also Hay v. Palmer, 2 P. Will. 502.

application upon the principle that the annuity was for the separate maintenance of a married woman, settled upon her by her husband; a circumstance which distinguished and excepted it out of the general rule applicable to other cases.

IV. Having in the preceding section considered the effects of deeds of separation at law and in equity, the next subjects to be treated upon will be, the wife's power of disposition over her separate maintenance; its liability to her debts; and her husband's responsibility for her engagements contracted during the separation.

Wife's power to dispose by anticipation of separate maintenance.

1. The question as to the wife's power of absolutely disposing of the funds settled upon her by her husband, in consequence of their mutual agreement to live separate, is one which does not appear to have been finally settled. The adherents to one opinion contending, that the allowance being made for the wife's *maintenance*, she cannot alien it by anticipation; whilst the persons who entertain the contrary opinion argue, that the wife being a feme sole in regard to this provision, there is no distinction between the present case, and the ordinary one of a limitation of property to the wife's separate use; so that the *jus disponendi* applies to each case indiscriminately.

Of the first opinion *Lord Alvanley* is supposed to have been, from the case of *Hyde* v. *Price* (*a*), in which (so far as it is necessary to state for the present purpose) the trust of 2500*l.*, 3 per cent. Bank annuities, was declared to permit the wife to receive the dividends for her *maintenance* and support during the joint lives of herself and husband. She and her husband by bond and warrant of attorney, in consideration of 560*l.* advanced by *B*, and applied in purchasing a commission in the army for the wife's son, secured an annuity to *B* payable out of the 2500*l.* Bank annuities

(*a*) 3 Ves. 437.

and the dividends. *Lord Alvanley*, M. R. held, that the grant of the annuity out of the dividends could not be supported against the wife; and he said that the dividends limited in trust for her as above, were not property to which she was intitled to her sole and separate use; that there was a *special trust* upon them; that she had *no dominion* over them; that her remedy for a misapplication was in that Court, and that the grant made by her was in defiance of the deed, which therefore could not be enforced in a Court of Equity.

The observations upon the last case are these, that the property was not limited to the separate use of the wife; it was vested in trustees upon trust as to the dividends for the wife for maintenance; she had no interest in the fund distinct from the special trust declared to be for her maintenance and support. It seems therefore to be a necessary consequence, that any disposition by the wife contrary to the trust could not be enforced in a Court of Equity. This case, then, appears to have been determined upon the special limitation in the deed, and not upon the general proposition that in no instance can a wife dispose by anticipation of the provision settled on her by her husband in a deed of separation. And it should seem, that where the property is so settled by the husband upon separation, as to vest it in the wife for her *separate use*, consistency requires that she should have the same powers of disposition over it, as over funds given to her in the like form of settlement by any other person. This distinction appears to reconcile all opinions upon the subject, and particularly what seems to have been the opinion of the Court in the case of *Greatley* v. *Noble* (*a*); for there the trust of *Lady Pomfret*'s allowance upon separation was declared to be for such intents and purposes as she should notwithstanding

(*a*) 3 Mad. 79, 94.

coverture direct or appoint, and in default of appointment for her sole and *separate use* and disposal. She was, therefore, by the effect of the above limitation a feme sole of the settled property, to which character attached the powers of disposition which have been before noticed (*a*).

Savings.

As the wife may dispose by will of savings from her separate estate limited to her sole use by a stranger, so also she may dispose of *savings* from her separate maintenance (*b*); but if she make no disposition, and her husband be the survivor, he will be intitled to them as her administrator (*c*), subject to her separate debts; and during the wife's life her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration (*d*).

Rights of wife's creditors upon her separate maintenance.

2. The intent of the provision made for the wife upon separation being to enable her to procure necessaries, it follows that the application of it to those purposes, however it may have been settled, is a legitimate appropriation of the property.

But it has been intimated from authority, that the same necessity exists that the wife should manifest an intention to charge her separate maintenance with the debts of particular creditors (*e*), as it has been before shown to exist (*f*), to intitle her creditors to a claim upon her separate estate when not settled upon her for support and maintenance upon separation. It is however to be observed, that there appears to be a wide difference in principle between the two cases; for when the property is limited to the wife's *separate* use, and she cohabits with her husband, the creditor has the husband's security for payment of the debt contracted by the wife for necessaries; it is but just, therefore, to

Equities of wife's *general* creditors.

(*a*) *Supra*, p. 182, *et seq.* (*b*) Gage v. Lyster, 2 Bro. Parl. Cas. 4. ed. Toml. 2 New Rep. C. P. 159. See also *supra*, pp. 138, 172. (*c*) Vol. i. p. 205. (*d*) *Supra*, p. 282. (*e*) Greatley v. Noble, 3 Mad. 94. (*f*) *Supra*, p. 235, *et seq.*

require some evidence of an agreement between her and her creditor that her separate estate should be applied in satisfaction of his demand. But when the creditor is deprived of the husband's security, by the allowance to the wife of a yearly sum for maintenance upon separation, *i. e.* for the express purpose of discharging her necessary debts, it seems but reasonable that a Court of Equity should consider this to be such an *appropriation* of the fund for those demands, as to intitle her separate creditors to maintain a suit in equity to subject it, in the hands of her trustees, to the satisfaction of their debts. *Lord Thurlow* seems to have had this distinction in view in *Lilia* v. *Airey* (*a*) (a case of separation), when he expressed himself thus:—"Upon the question whether a creditor has a right against the separate estate of the wife, and against the husband as allowing it to her, my opinion is, that *primâ facie* a creditor has such right (*b*)."

Equities of *particular* creditors.

Whatever may be the decision upon such a case when brought before the Court, there is no doubt that when the wife's intention appears, or is inferred to charge her separate maintenance with a debt for necessaries, it will intitle the creditor to a satisfaction of his debt out of the fund provided for such maintenance.

Thus, in *Stuart* v. *Lord Kirkwall* (*c*), the separate maintenance settled upon the wife was 1600*l.* a year. She accepted a bill of exchange drawn upon her by a milliner for 389*l.* 14*s.* 6*d.* and interest, which bill being dishonoured by the wife, a suit was instituted for payment of the debt, not only out of the money then due in the hands of her trustees in respect of her separate maintenance, but also out of future accruing payments, and for an injunction to restrain the trustees

(*a*) 1 Ves. jun. 277. (*b*) *Supra*, p. 235.
(*c*) 3 Mad. 387.

from paying any more of the annuity to the wife. After the answers had been filed, application was made to *Lord Eldon* for an injunction, and that the annuity, as it became due, might be paid into the Bank, &c.; and his Lordship made an order to that effect. The cause having been afterwards heard by the present Vice-Chancellor, he decreed according to the prayer of the bill.

Husband's liability to his wife's debts during separation.

3. The next consideration is how far the allowance of separate maintenance to the wife will discharge her husband from the payment of her debts.

The obligation of the husband to maintain his wife, and to supply her with necessaries suitable to his fortune and rank in life, has been before mentioned (*a*). This obligation continued at the common law, and still continues except she forfeit it by great misconduct, as by adultery, &c.; and when the husband is thus discharged from that duty, he is not liable either at law or in equity to her contracts or engagements for those necessaries (*b*). The common law, however, did not permit this obligation of the husband to be discharged in consequence of any agreement of separation entered into between themselves; but when Courts of Law and Equity sanctioned such a divorce by enforcing agreements of separate maintenance, then, in analogy to this discharge at common law, those Courts held that the husband should be equally exempted from his wife's obligations, but they departed from the common law when the analogy between the two cases failed; for in the case now under consideration the wife being free from the imputations upon her conduct, which in the other induced that law to discharge her husband from all liability on her account, the Courts imposed upon the husband the condition that he should purchase his

(*a*) *Supra*, p. 110. (*b*) *Supra*, p. 113.

exemption at the price of an allowance for maintenance. Hence the husband will not (as it is presumed) be liable to the debts of his wife, if upon separation he provide her with a proper allowance for maintenance (*a*), and pay it regularly afterwards. What the allowance for maintenance must be to produce that effect, I shall endeavour to collect from the cases.

To discharge the husband, the allowance must be adequate and regularly paid.

The allowance for maintenance must not be precarious (*b*), and it must be suitable to the husband's fortune and rank in life, which is a question proper for the consideration of a jury; and if it be found to be inadequate, the husband, as it seems, will not be discharged at law from his liability to answer for his wife's contracts for necessaries; and her acquiescence in receipt of the allowance will not affect the rights of her creditors against him (*c*). From the case of *Lambert* v. *Lambert* (*d*), it appears that in this instance a

(*a*) Todd v. Stokes, 1 Salk. 116. 1 Ld. Raym. 444, S. C. 2 New Rep. 148. (*b*) Thompson v. Harvey, 4 Burr. 2177.
(*c*) Hodgkinson v. Fletcher, 4 Camb. Rep. N. P. 70.

(*d*) 2 Bro. Parl. Cas. 18. ed. Toml. This case came before the House of Lords in the year 1767, on an appeal from the Court of Chancery of Ireland. The Bill was filed by the wife, alleging that she had by fear and duress been driven to execute a deed of separation, which provided her with an inadequate allowance: the husband's defence rested chiefly on a denial of the marriage. The Court decreed that the deed, so far as it might prevent the wife from recovering a maintenance during the separation between her and her husband should be set aside; and it was referred to the Master to inquire into the circumstances of the estate and fortune both of the husband and wife, and what would be proper to allow the latter for her maintenance, during the separation. This decree was affirmed by the House of Lords.

The grounds of this decision do not appear from the report. The language of the decree proceeds upon the supposition, that the deed while it remained unimpeached, would prevent the wife from recovering a proper allowance of alimony, which indeed followed from the opinion then prevailing, that a feme covert was competent to

Court of Equity would refer it to a Master to settle the amount of a proper maintenance for the wife during

contract for a separation. One of the arguments on the part of the wife was, that the object of the suit was to set aside a deed, a matter of which the Court of Chancery clearly had cognizance, and that the rest of the relief was consequential. Possibly this may have been the reason of the decision. It seems to have been so considered by Lord Loughborough, who, in 2 Ves. Jun. 195, alluded to this case, and said that the authorities were much considered: he added, "I take it now to be the established law, that no Court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter, that she becomes entitled to a separate maintenance." If this was the ground of the case, the principle of it does not apply at present, as a separation deed is not held to be binding on the wife personally, and does not prevent her from suing for alimony.

But whatever may have been the principle of this decree, the reference to the Master to fix a proper allowance for a separate maintenance, went far beyond the limits within which the Court of Chancery in England has confined its jurisdiction, the power of decreeing separate maintenance having long since been distinctly disclaimed, except in cases where there is an agreement or a trust for that purpose, (3 Atk. 550. 2 Cox. 102. 3 Ves. 359), or where the wife's property is within the control of the Court, *ante*, vol. i. 278.

Lord Loughborough is indeed reported to have said, that if the wife applied to the Court of Chancery "upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart; as incidental to that, the Chancellor will allow her separate maintenance." 1 Ves. Jun. 195. This passage has been quoted by Sir W. Grant, 19. Ves. 397; and the same opinion was advanced in the argument of Lambert v. Lambert, 2 Bro. P. C. 26. But there seems to be no reported instance of the exercise of such a jurisdiction, and it would be inconsistent with the object and the form of the writ of supplicavit, (post, p. 318, note, 320.)

Except in the particular cases mentioned above, the wife can only obtain a separate maintenance in the Ecclesiastical Courts, where alimony is decreed to be paid to her by the husband during the pendency of any suit between them, and after its termination, if it ends in a sentence of separation on the ground of the husband's misconduct.

Alimony, *pendente lite*, is allowed in suits instituted either by the husband or the wife for divorce or for restitution of conjugal rights, Alimony, when allowed

the separation, which, when made, must have the effect of discharging the husband from her future debts.

by the Ecclesiastical Courts.

and in suits for nullity of marriage instituted by the husband, 2 Hagg. 204. Poynder on Marriage, p. 247. The application may be made by the wife as soon as it appears from the pleadings or the evidence that there has been an actual marriage. Ibid. and 2 Hagg. 199. 2 Addams, 254. And the allowance is usually computed from the return of the citation, (Bain v. Bain, 2 Addams, 254) though in cases of delay occasioned by the husband, it is in the discretion of the Court to allow it from the date of the citation, 2 Phill. 209. Where the wife appeals from a sentence of separation pronounced against her by reason of her adultery, she is allowed alimony during the pendency of the appeal. Loveden v. Loveden, 1 Phill. 209. In that case the allowance was made from the date of the sentence and appeal, which were on the same day. See Brisco v. Brisco, 3 Phill. 206. Permanent alimony commences from the date of the sentence of separation. Cooke v. Cooke, 2 Phill. 40.

Amount allowed for alimony.

To determine the amount to be allowed, inquiries are made into the state of the husband's circumstances, as to which he is bound to answer upon oath. Fraser v. Fraser, Poynder, p. 248. His statements may be disputed and met by evidence on the part of the wife. Brisco v. Brisco, 2 Hagg. 199. The Court also takes into consideration any separate income which the wife may be in receipt of, whether arising from separate property or pin-money, (2 Hagg. 201. 203. 1 Phill. 40. 2 Phill. 153) or from an allowance secured to her by a deed of separation. Blaquiere v. Blaquiere, 3 Phill. 258. And if her separate income is adequate, no allowance of alimony is made. See Wilson v. Wilson. 2 Hagg. 203. Davies v. Davies, ibid. 204, *n.* 1 Phill. 40.

A more liberal allowance is made for permanent alimony, than for alimony *pendente lite*, both because the delinquency of the husband is then established, and because the Court considers the situation of the wife during the continuance of the suit to call for retirement and seclusion. 2 Phill. 44. 109. 2 Hagg. 201. In several instances a third part of the joint income has been assigned to the wife for permanent alimony, in some as much as a moiety. See Cooke v. Cooke, 2 Phill. 40. Otway v. Otway, ibid. 109. Smith v. Smith, ibid. 235. Street v. Street, 2 Addams, 2. One-fifth has been mentioned in one case as a reasonable proportion for the allowance *pendente lite* (2 Hagg. 201). In others a larger allowance has been made. Smith v. Smith, 2 Phill. 152. The proportion is not regulated by any certain rule; but in determining it, the Court is influenced by all the circumstances of the case, allowing less where

Supposing the maintenance to be adequate to the circumstances and condition in life of the husband, it was decided in *Nurse* v. *Craig* (*a*) that it must be duly paid in order to discharge him from his liability to her creditors; the averring of which payment is usual, and seems necessary in the declaration at law. The case last referred to establishes by three judges against the opinion of *Mansfield*, C. J., that the *mere* covenant or contract of the husband to pay separate maintenance will not discharge his common law obligation to support his wife, and that a creditor who has furnished her with necessaries may sustain an action against him for the payment of the debt (*b*).

the husband has children to maintain (2 Phill. 110. 3 Phill. 259) where expenses have been thrown on him by extravagance on the part of the wife (2 Hagg. 202), or where his income is derived from his personal exertions (2 Phill. 44); and allowing more when a large part of the property has been derived from the wife (2 Phill. 44. 235), or where there have been circumstances of aggravation in the husband's conduct. 2 Phill. 46. 110. 2 Addams, 2. It is in the discretion of the Court to vary the amount in case of a subsequent alteration of the husband's circumstances. See Poynder, p. 255, and 2 Phill. 110.

Costs of matrimonial causes in the Ecclesiastical Courts.

In suits in the Ecclesiastical Courts, the general rule is, that the husband pays the costs on whichever side the suit begins, and as soon as the marriage is admitted or proved, the wife's proctor may call upon the husband for payment of his bill up to that time. This rule, however, admits of an exception in cases where the wife has separate property sufficient to enable her to maintain herself, and to carry on the suit. See Wilson v. Wilson, 2 Hagg. 203, and the cases there cited.

(*a*) 2 New Rep. C. P. 148, 153, 156.

(*b*) The principle is thus stated by Mr. Justice Heath: "It is the duty of the husband to provide necessaries for his wife. The question is, whether he discharges that duty by merely entering into a covenant with a trustee for payment of an allowance? If he refuse to perform that covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation, on the mere ground of an agreement to do something else in the place, unless that agreement be performed." 2 N.

But wife is not *personally* liable on account of her debts during separation.

It has been before noticed, that when the husband is discharged from his liability to answer for his wife's debts, she is not *personally* liable for them; because,

R. 156. Vid. *ante*, p. 109. note (*c*). For similar reasons, it was held, that the husband was not discharged from his liability for his wife's necessary expenses, by a separation deed assigning her property to trustees for her separate use, when it did not appear that the trustees had taken possession. Burrett v. Booty, 8 Taunt. 343. And since it is the payment of the allowance which discharges the husband, it is immaterial whether it be or be not secured by deed or writing. Hodgkinson v. Fletcher, 4 Camp. 70.

It seems that the payment of a separate maintenance, though it discharges the husband from the liability to his wife's debts, so far as it arises from his duty to maintain her, may still leave him open to the demands of persons dealing with the wife, under the supposition that she is still authorized by him to contract upon his credit. It being, in general, presumed, that in the purchase of articles of necessity, the wife has the authority of the husband to contract as his agent, it follows that her contracts, like those of any other agent, will bind him until it be known that that authority has been withdrawn. Thus in Rawlins v. Vandyke, 3. Esp. 250. the wife lived upon a separate allowance; but the husband had occasionally visited her, and paid bills for her. Lord Eldon ruled, that he was liable for goods furnished to her by a tradesman, not having notice of the allowance: the notice of the allowance would be notice of the husband's dissent. See *ante* p. 117, note, and Hinton v. Hudson, Freem. 248. It is not, however, necessary to prove express notice: the general notoriety of the fact, that the husband and wife are separated is sufficient. See Ozard v. Darnford, 1 Selw. N. P. 279. If the creditor has reason to know that the contract has been made without the husband's assent, his claim must depend upon the question, whether the husband is still bound to furnish his wife with necessaries.

It has been seen that where the credit is given to the wife, the party trusting to her alone, the husband is not liable, *ante*, p. 110, Note. And on this principle it seems to follow, that, even if no separate allowance were paid, the husband might be discharged if it could be established to the satisfaction of the jury, that the dealing took place solely on the credit of the wife.

In a case where the wife was living separately on an allowance, the husband having promised to pay a debt contracted by her, was held liable. Hornbuckle v. Hornbury, 2 Stark. 177.

as a married woman, she cannot enter into a contract to bind herself (*a*). A consequence of this disability in the wife to contract when living apart from her husband appears in the case of *Smith* v. *the Sheriff of Middlesex* (*b*), which was to the following effect:—

A contract with the wife passes no right of property.

The wife resided separately from her husband under a deed of separation, securing to her, as it is presumed, a proper separate maintenance. She had been supplied by a tradesman, the plaintiff, with goods and furniture upon hire, but no sum was agreed upon, nor had any period been fixed during which the goods and furniture were to continue on hire. These articles were taken in execution by a creditor of the husband; but before a sale, the plaintiff gave notice to the defendant (the sheriff) that they were *his property;* and that was the question in the action of *trover* which the plaintiff brought against the sheriff to obtain possession of them. The Court held that the tradesman was intitled to recover the goods, upon the principle that the wife could not make a contract for the hire of them; and the Court observed, that a contract to be valid must bind both parties; but that this agreement being by a married woman could not bind her, so that the property in the goods never having been devested out of the plaintiff, he had a right to recover the possession of them.

As to determination of wife's separate allowance.

V. I shall now proceed to inquire what will determine the wife's separate provision for maintenance, and her remedies in case of molestation by her husband during the separation.

1. In a prior chapter was considered what would determine a maintenance which had been granted by the Court of Chancery, out of the wife's own property, for her support during the absence of her husband (*c*); and it appeared, that if he offered to live with her, and

(*a*) *Supra*, p. 117, *et seq.* (*b*) 15 East, 607. (*c*) Vol. 1. p. 282, *et seq.*

she refused without a sufficient reason to return to him, such offer and refusal would determine her allowance, because the Court which granted it did so temporarily, viz. till the husband's return and his cohabitation with his wife, if not prevented by his own fault; the Court therefore withdraws the allowance, if cohabitation be prevented by the perverseness or caprice of the wife. But the application of this doctrine does not completely hold in cases where the husband and wife have agreed to live apart, and she has a separate maintenance secured to her by agreement; for that being founded upon *express contract* between the parties, or between the husband and the friends of his wife, it requires the same mutual agreement to dissolve as to make the contract.

The following distinctions seem to have been established in regard to this subject:

Effects of husband's offer to cohabit with his wife.

First, that if the agreement for separation be for the lives of the parties, or until *both* agree to live together again, the wife's consent is necessary to put an end to the allowance of separate maintenance; so that the offer of her husband to take her back again will not have that effect.

Second, that if the agreement for separation be merely temporary, or for an uncertain period, then the husband's offer to take her back again, if not artfully and insincerely made, will, without regard to her refusal to return, determine her separate allowance.

Of the *first* proposition, *Guth* v. *Guth*, *Hoare* v. *Hoare*, before stated (*a*), and *Gawden* v. *Draper* (*b*), are instances. Of the *second* proposition, the case of *Head* v. *Head* (*c*), is an instance. There the agreement to pay separate maintenance was confined to such

(*a*) 3 Bro. C. C. 614. 2 Ridgew. Parl. Ca. 268, and stated *supra*, pp. 279, 295. (*b*) 2 Ventr. 217. (*c*) 3 Atk. 547, and stated *supra*, p. 297.

time only as the husband and wife should *continue* to live apart; *i. e.* with the consent of both parties; and *Lord Hardwicke* decreed, that the husband having offered to receive his wife, he should receive and treat her as his wife if she would return to him; but in case she did not return within a month, the maintenance should cease for the future.

If, however, a third person covenant for a valuable consideration moving from the husband, to pay to the wife a separate maintenance, who was then living apart from her husband by mutual agreement, it seems that the offer of such person to take her to his house will not exempt her from her demand for the separate allowance, because the law imposes upon her no obligation to reside with such person; besides, if such a residence were accepted by her, it would have no effect in promoting a reconciliation between her and her husband; which is the object the law has in view in withholding the maintenance when it is proper to do so.

Accordingly, in *Dutton* v. *Dutton* (*a*), *A*, the wife's son, for a valuable consideration, covenanted to indemnify the husband (his father) from all debts, charges, and expenses for the maintenance of the wife, who at that time lived apart from her husband by consent. Upon the wife's bill against her husband and *A* for an allowance for maintenance, *A*, in defence to the claim, *offered* to maintain her at his own house. But *Lord Cowper*, C., ordered her an allowance of 200*l.* a year; his Lordship observing, that *A*, by his covenant, took upon himself the charge of maintaining the wife, and stood in the husband's place, who, under a voluntary separation, was obliged to grant an allowance to her; that *A* was in the nature of a trustee for the wife to the extent of a reasonable allowance for maintenance, and

(*a*) 4 Vin. Abr. 178, pl. 18.

that she was not bound to accept *A's* offer to take her to his house.

Subsequent cohabitation will have that effect.

If after the separation, the husband and wife be reconciled and live together, that circumstance will avoid the deed or articles, and consequently it will determine the separate allowance; for by cohabitation the separation, which was the principal, having ceased, the maintenance, which was the accessary, must expire with it. This was so considered by *Lord Eldon*, in the case of *Lord St. John* v. *Lady St. John* (*a*), and by *Buller*, J., in *Fletcher* v. *Fletcher* (*b*). The law, in this respect, acts in consistency with the practice of the Ecclesiastical Court; for, in general, when a reconciliation takes place between the parties, there is an end in that Court of the deed or articles of separation (*c*).

Instances in which adultery by the wife will and will not be a bar to her relief in equity, have been before noticed (*d*). In the matter now under consideration, this crime will not incapacitate her from compelling her husband to discharge her separate maintenance, because at common law adultery did not affect her right to prosecute her civil claims. Before the statute of *Westminster* the second, she was intitled to dower, as before appears, and the exception of it by a particular provision proves that, in other cases, adultery was no bar to the wife enforcing any of her rights in Courts of Justice. In addition to the authorities stated and referred to in the pages mentioned in the last note,

(*a*) 11 Ves. 537. (*b*) 2 Cox Rep. 99, 105, 106.

(*c*) 11 Ves. 537, *ante*, p. 273, note. It has been decided at law, that a separation deed is not put an end to, by an ineffectual suit by the wife for a restitution of conjugal rights, or by a divorce, *a mensâ et thoro*, obtained by the husband on the ground of her adultery. Jee v. Thurlow, 2 Barn. and Cress. 547.

(*d*) Vol. 1. pp. 286, 523, *et supra*, p. 134.

may be added the judgment of *Sir William Grant*, M. R., in the case of *Seagrave* v. *Seagrave* (*a*).

Wife's remedies against her husband's molestation,

2. What next remains to be considered, are the wife's remedies against her husband when she is molested by him during the separation.

Upon this subject, Courts of Law have determined that the husband, by his own agreement, may so far bind himself as to surrender in favour of his wife the right which the common law gives him to her society. This seems to be the principle upon which the cases that will be afterwards cited were determined. *Lord Eldon* expressed disapprobation of those decisions in *Lord St. John* v. *Lady St. John* (*b*); but whilst the doctrine is supported by the opinions and decisions of several great men, the law must be considered settled until a solemn review of it take place, and those opinions and decisions are erased from the list of authorities.

Assuming, then, the above principle to be now established, it is a consequence, that if the husband by covenant, on separation between himself and wife, engage not to disturb her, nor any person with whom she shall reside, and that she may live where and with whom she pleases without his molestation; should he, in breach of his engagement, either under colour of law, or by violence, attempt to seize, or actually seize her person, she may in the one case by filing articles of the peace, or by a supplicavit in Chancery, and in the other by suing out a *habeas corpus*, obtain security for her person against danger, or regain her liberty, as the

by articles of the peace, supplicavit, and habeas corpus.

(*a*) So also in Jee v. Thurlow, it was agreed that adultery committed by the wife would not affect her rights under a deed of separation. See also Field v. Serres, 1 N. R. 121. In Scholey v. Goodman, 1 Bing. 349. 8 B. Moore, 350, this point was doubted, but the case of Seagrave v. Seagrave was not cited.

(*b*) 11 Ves. 532.

circumstances may require (*a*). Accordingly, in *Lord Vane's* case, before mentioned (*b*), articles of the peace were preferred by the wife living apart from her husband, and security was ordered to be given by him. The security required was 1000*l.* from himself and two persons as bail in 500*l.* each.

Articles of the peace cannot be falsified by husband.

It must be noticed that the allegations contained in articles of the peace, will not be permitted to be denied or explained by the husband, by affidavit or otherwise, except so far as such explanation is confined to any ambiguity in the expressions used in the articles (*c*).

Supplicavit.

Of a similar nature with articles of the peace at law is the writ of *supplicavit*, issuing out of the Court of Chancery upon articles exhibited by the wife against her husband. These articles, as those at law, cannot, it is presumed, be falsified by the husband. The reason is, that both of these proceedings are preventive, *i. e.* to preserve the peace, and restrain the commission of an irreparable injury; and if the person complaining swear that his or her life is in danger, this is a fact upon which the Court cannot decide: therefore whether at law opposition be made to the Court requiring any security, or for a discharge of it after it be given, or whether opposition be made to the issuing of a supplicavit, or an application be made to discharge the recognizance when entered into, neither a Court of Law nor of Equity will attend to these defences, or applications on account of the possible mischievous con-

(*a*) It is to be observed, that the object of articles of the peace, and of the writ of supplicavit, is merely to prevent personal violence; and the right to this protection is not connected with engagements for a separation. In the case of a supplicavit, the security is taken, as Lord Hardwicke observes, on the supposition that they are to live together. 3 Atk. 550. As to the cases on writs of habeas corpus, vid. *ante*, p. 271, note.

(*b*) *Supra*, p. 280. (*c*) The King v. Doherty, 13 East, 171, and see the cases referred to in that case, and the others in the notes; also the King v. Lee, 2 Lev. 128.

sequences (*a*). On the other hand a person is not to continue under penalties or imprisonment the whole of his life. In order, therefore, to do justice, consistently with safety, the general rule at law is to discharge the security if the party, at the end of *one year* after it was given, conducted himself peaceably during that period; which rule *Lord King* said, in *ex parte Grosvenor* (*b*), was reasonable, and that he was disposed to follow it in equity. In *ex parte King* (*c*), *Willes* and *Wilmot*, Lords Commissioners, observed, that this general rule admitted of exceptions when the party complaining was under the authority or the influence of the person complained of. It is presumed, therefore, that if the husband do not misconduct himself during the year, but his wife make out a case that when the supplicavit is discharged, he will very probably abuse his authority over her to procure her separate estate (as in *ex parte King*, before referred to), by using her ill and taking her abroad, the Court will not discharge the writ whilst well-grounded fears exist.

As to the discharge of the securities under this writ and articles of the peace at law.

In *Head* v. *Head* (*d*), a writ of supplicavit was issued upon the threat of the husband to take his wife to a madhouse: and it would seem that in all cases where the wife is intitled at law to security against her husband's ill-treatment, or threats of injury to her person, she is equally intitled to the writ of supplicavit in Chancery, when living apart from him under articles of separation, she has a good reason to be afraid of her own safety; but a reasonable foundation must appear upon the face of the articles filed for the writ of apprehension of serious personal danger, and so it is at law (*e*).

The case made by the articles for security must be a well-grounded fear of serious personal danger.

(*a*) Clavering's case, 2 P. Will. 203. King v. King, 2 Ves. sen. 578. (*b*) 3 P. Will. 103. (*c*) Ambl. 334. (*d*) 3 Atk. 548. Reg. Lib. B. 1774, fol. 166. See Tunnicliff's case, 1 Jac. and Walk. 348, and the cases there referred to; and see *ante*, p. 309, note. (*e*) 13 East, 172, *in notis*.

The reader will notice that the conclusionary part of the writ of supplicavit contains a proviso, which proves the husband's right to place his wife under moderate restraint. The writ, after ordering the sheriff to take bail from him to treat and govern her well and honestly, and to do or procure to be done to her no ill or damage of her body, annexes this qualification, aliter quàm ad virum suum ex causâ regiminis et *castigationis* uxoris suæ *licite rationabiliter pertinet* (*a*).

Reasoning then upon the effect of this proviso, if the case made by the articles amounted to no more than occasional restraint, or moderate correction, which might be necessary, it may be presumed, that it would be difficult to induce a Court of Law or Equity to interfere under such circumstances.

Habeas corpus.

The last and greatest remedy which the law has extended to a married woman living apart from her husband in consequence of their mutual agreement, is that of the *habeas corpus*, the great bulwark of civil liberty. This writ is only necessary where the purpose has been executed, and the wife's liberty is at an end by her actual confinement. The principle upon which this writ has been granted to a married woman against her husband in abridgment of his marital rights has been already stated; and the cases in support of it only remain to be considered.

In *Listor*'s case, decided nearly a century ago (*b*), the husband, during separation from his wife by their mutual agreement, seized her by force and carried her home in order to compel her to live with him, contrary to the articles entered into upon their agreement to live apart. To regain her freedom the wife sued out a *habeas corpus*; and the Court of King's Bench gave her liberty, assigning the reason, viz. that she and her

(*a*) Fits. N. B. 80, F. see 1 Stra. 478. See 1 Stra. 477. 13 East, 173, *in notis.*

(*b*) 8 Geo. I.

husband separated by consent and under articles to live apart.

The next case was the *King* v. *Mead* (*a*). There the husband covenanted never to disturb his wife, nor any person with whom she should live. The separation took place, and he, in order to have an opportunity of seizing her by force, or for some bad purpose, sued out a *habeas corpus* to bring up her body. The Court held that the agreement was a *formal renunciation* by the husband of his marital right either to seize his wife, or to *force* her to live with him; that any attempt by him to seize her would be a breach of the peace; and that if such an attempt were made in her return home from the Court it would be a *contempt*, and the Court told her she was at liberty.

So also in the *King* v. *Winton* (*b*), the husband applied for a *habeas corpus* to bring up the body of his wife. Upon a question as to the validity of the return, *Buller*, J., expressed himself to the following effect: "If this case turn out upon further investigation to be like that in *Burrow*, I am strongly inclined to think this would be an answer to the writ."

A similar application was made by the husband for this writ in the *King* v. *Edgar* (*c*). The answer given upon the return of it was, that the wife being intitled to considerable property to her separate use, she and her husband agreed to live apart under articles of separation, by which, in consideration of 3000*l.*, he was to resign all interest in her property; but that he afterwards seized and confined her. *Lord Kenyon* said, that unless the wife had done something notoriously to destroy the articles, it was *settled* that the husband had *renounced* all right to her, that he had no claim after the articles of separation. The Court therefore

(*a*) 1 Burr. 542. (*b*) 5 Term Rep. 91. (*c*) Rep. B. R. Temp. Lord Hardwicke, by Ridgway, 152, *in notis*.

told her that she was at liberty, and if she were apprehensive of violence she might have an officer of the Court to protect her.

Connected with the principle of the last decisions, the final consideration will be,

VI. The effect of mutual separation upon the husband's right to maintain an action for criminal conversation with his wife during the period of their living apart.

Actions of this description are founded on the injury which the husband has sustained in the deprivation of the comfort, society, and assistance of his wife. This is the principle. The municipal law disregards the crime, leaving the punishment of the offence to the feeble jurisdiction of the Ecclesiastical tribunal. Courts of Common Law merely take cognizance of this subject as a civil injury to be compensated by damages. The loss of the comfort, society, and assistance of the wife is that injury, and that allegation is always contained in declarations at law as material and substantial. This practice is evidence of the ground upon which the law permits such actions to be maintained. The above principle, then, being the gist and foundation of those actions, the consequence must be, that when the husband voluntarily relinquishes the comfort, society, and assistance of his wife by consenting to a separation from her, he can suffer no loss from her incontinency whilst such separation continues; and so it was ruled by *Lord Kenyon* at *Nisi Prius* in *Weedon* v. *Timbrell*, and his opinion was afterwards confirmed by the Court of *King's Bench* upon argument as to the propriety of granting a new trial (*a*).

(*a*) 5 Term Rep. 357. A similar opinion was intimated by Lord Kenyon in two previous cases, Bartelot v. Hawker, Peake, N. P. C. 7. Hodges v. Windham, ibid. 39; in which articles of

The case was alluded to in *Chambers* v. *Caulfield*(*a*), and nothing fell from the Court to shake its validity.

But the case of *Chambers* v. *Caulfield* establishes this proposition, that the surrender by the husband of his marital rights to the comfort, society, and assistance of his wife, under the instrument of separation, must be complete and absolute; so that if the husband *reserve* his wife's assistance for the benefit of their infant children, and she is to have liberty to visit his

separation had been executed. In Weedon v. Timbrell, it does not appear that there was a deed or articles of separation.

The authority of these cases has been much shaken by Chambers v. Caulfield. Lord Ellenborough, upon the opening of that case, desired that it might be argued upon the general point, whether the mere fact of a separation between husband and wife, by deed, were such an absolute renunciation of his marital rights, as precluded the husband from maintaining an action for the seduction of his wife, saying that he did not consider that question as concluded by the decision in Weedon v. Timbrell.

The editor has been favoured by Mr. Ryan with a note of a recent case on this point,—Graham v. Wigley, 15th Dec. 1824. The parties had separated by consent, and were living apart when the adultery was committed: but there was no deed of separation. Lord Chief Justice Abbot held that the action would lie, saying that the separation was not complete: the wife might sue for restitution of conjugal rights. It is believed that other cases have occurred at *nisi prius*, in which the doctrine of Weedon v. Timbrell has not been followed, and that the general opinion at present is against it (*b*).

It will be remembered, that the case was decided at a time when principles were applied to deeds of separation different from those since adopted. If the proposition laid down in Marshall v. Rutton, 8 T. R. 548, that the husband and wife cannot by agreement alter their legal characters and capacities, be correct, it follows, that notwithstanding such an agreement, the relation of husband and wife, and the rights arising out of that relation, must be still considered as subsisting for all legal purposes; and, therefore, that a separation will not deprive the husband of the legal right of maintaining this action, whatever effect it may have upon the amount of damages.

(*a*) 6 East, 244, 256.

(*b*) See Hammond's Nisi Prius, p. 232.

house as often as she pleases, to afford them all necessary care and attention, in such and the like instances the husband may maintain an action for criminal intercourse with her during the separation, upon the principle that he had *not* in fact *wholly* parted with the comfort, society, and *assistance* of his wife.

APPENDIX.

No. I.

Power of Leasing contained in a Settlement (*a*).

PROVIDED also, and it is hereby agreed and declared, between and by the parties to these presents, that it shall and may be lawful to and for the said *E*, *H*, and *G* (his intended wife), as and when by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of, and entitled to the receipt of the rents, issues, and profits of the said manors, and other hereditaments, hereby granted and released, or expressed and intended so to be, during their respective lives; and also to and for the said *C* and *D*, and the survivor of them, and the executors or administrators of such survivor, from time to time, and at all times during the minority of any child or children who by virtue of any of the limitations aforesaid shall be entitled to any estate of freehold and inheritance of and in the said manors and other hereditaments, by any indenture or indentures to be sealed and delivered by them respectively, in the presence of and attested by two or more credible witnesses, to limit or appoint, by way of demise or lease, all or any part or parts of the said manors and other hereditaments, with the appurtenances, to any person or persons, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion by way of future interest, so as there be reserved on every such limitation or appointment, by way of demise or lease, the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that can or may be reasonably had or gotten for the same,

To the husband and wife respectively, when in possession: and after their deaths, to other persons, (usually the releasees to uses, and the trustees to preserve the contingent remainders) during the minorities of tenants in tail by purchase.

By indenture, to be sealed, and delivered, and attested by two witnesses.

To grant leases for any term not exceeding twenty-one years, in possession, not in reversion.

(*a*) Vide Vol. I. p. 116.

At the best rent, without fine, with condition of re-entry. Counterpart lease to be executed by lessee, with covenant to pay rent. Lessee not to be dispunishable for waste.

without taking any fine, premium, or foregift, or any thing in the nature of a fine, premium, or foregift, for the making thereof; and so as there be contained in every such limitation or appointment, by way of demise or lease, a condition of re-entry for non-payment of the rent or rents thereby to be respectively reserved; and so as the appointee or appointees, lessee or lessees, do execute a counterpart thereof respectively, and do thereby covenant for the due payment of the rent or rents thereby to be respectively reserved, and be not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

No. II.

Lease by Husband and Wife under the Power of leasing, No. 1. (*a*).

THIS INDENTURE made, &c. between *E H*, of , and *G*, his wife, of the one part, and *C B*, of , of the other part, WITNESSETH, that pursuant to, and by force and virtue, and in exercise and execution of a power or authority to them, the said *E H*, and *G*, his wife, for this purpose given or limited, in and by a certain indenture of release, bearing date the day of , grounded on a lease for a year, bearing date the day next before the day of the date thereof, the release being made, or expressed to be made, between the said *E H* of the first part, the said *G H* (then *G P*, spinster) of the second part, and *C* and *D* of the third part (being the settlement made previously to, and in contemplation of, the marriage then intended, and which was shortly afterwards duly had and solemnised between the said *E H* and *G*, now his wife), and of every or any other power or authority, in anywise enabling them in this behalf, and for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, on the part and behalf of the said *C B*, his executors, administrators, and assigns, to be paid, observed, and performed; they the said *E H*, and *G*, his wife, DO, by this indenture, sealed and delivered by them respectively, in the presence of, and attested by, the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said *E H* and *G H*, limit, appoint, and demise unto the said *C B*, his executors, administrators, and assigns, ALL THAT, &c. (the parcels) together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground

Parties.

WITNESSETH that pursuant to the power.

and in consideration of the rent and covenants,

husband and wife,

limit, appoint, and demise to the lessee.

The parcels, and general words.

(*a*) Vide Vol. I. p. 116.

and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said messuage or farm-house, lands, hereditaments and premises belonging, or in anywise appertaining, or with the same, or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any part of them, or appurtenant thereunto, with their and every of their appurtenances, TO HAVE AND TO HOLD the said messuage or farm-house, pieces or parcels of land, and all and singular other the premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with the appurtenances, unto the said *C B*, his executors, administrators, and assigns, for the term of twenty-one years, to be computed from the day of, &c. now last past, and thenceforth next ensuing, and fully to be complete and ended; YIELDING AND PAYING yearly, and every year during the said term, unto the person or persons for the time being entitled to the said premises in reversion or remainder immediately expectant, on the said term of twenty-one years, the yearly rent or sum of £875 of lawful money of *Great Britain*, by equal quarterly payments, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December* in every year, without any deduction or abatement whatsoever for or in respect of the land-tax, or any other present or future taxes, or any other matter or thing whatsoever; the first quarterly payment of the said yearly rent to be made on the 25th day of *March* next ensuing the day of the date of these presents: PROVIDED ALWAYS nevertheless, and these presents are upon this express condition, that if the said yearly rent or sum of £875 hereinbefore reserved, or any part thereof, shall be in arrear after the same ought to be paid as aforesaid, or if the said *C B*, his executors, administrators, or assigns, shall at any time or times, during the continuance of this demise, transfer or assign over, or under-let, or agree to transfer or assign over, or under-let, to any person or persons whomsoever, the premises hereinbefore limited, appointed, or demised, or any part or parts thereof, for all or any part of the said term, without the licence and consent in writing of the person or persons for the time being entitled as aforesaid for that purpose first had and obtained; or if the said *C B*, his executors, administrators, or assigns, shall become bankrupt or

HABENDUM.

For the term of twenty-one years in possession,

at the yearly rent of 875*l.* to be paid quarterly, without deduction.

PROVISO for RE-ENTRY,

on non-payment of rent,

or by lessee's assignment, without consent,

or by lessee becoming

shall compound his or their debts, or assign over his or their estate and effects for payment thereof, or if any execution shall issue against him or them or any of his or their effects whatsoever, whereupon the said premises, or any part thereof, shall be taken or attempted to be taken in execution; or if the said *C B*, his executors, administrators, or assigns, shall not from time to time, and at all times during the continuance of this demise, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements which on his and their part are and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of these presents; then and in any of the said cases it shall and may be lawful to and for the person or persons for the time being entitled as aforesaid into and upon the said appointed and demised premises, or any part thereof, in the name of the whole, to enter, and the same to have, retain, possess, and enjoy, discharged from these presents, and the limitation, appointment, and demise intended to be hereby made as aforesaid, any thing herein contained to the contrary thereof in any wise notwithstanding; AND the said *C B* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with, and to the person or persons for the time being entitled as aforesaid, in manner following: that is to say, that he, the said *C B*, his executors, administrators, and assigns, shall and will well and truly pay, or cause to be paid unto the person or persons for the time being entitled as aforesaid, the aforesaid yearly rent of £875, on such days or times as are hereinbefore mentioned and appointed for the payment thereof; AND ALSO shall and will well and truly pay, bear, and discharge the land-tax, and all other taxes, charges, rates, duties, and assessments whatsoever, either already taxed, charged, rated, assessed, or imposed, or at any time or times hereafter during the continuance of this demise to be taxed, charged, rated, assessed, or imposed upon the same yearly rent of £875 upon the said premises hereinbefore limited, appointed, and demised, or any of them, or any part or parts thereof, or upon the person or persons for the time being entitled as aforesaid in respect thereof, as landlord or landlords of the same premises by authority of parliament or otherwise howsoever; AND ALSO shall and will, at his and their own costs and charges, well and substantially uphold, repair, support, maintain, sustain, and amend the said messuage or farm-house, and all the

bankrupt, or compounding debts, or assigning estate for payment of debts, or by execution issuing against effects, whereupon premises are taken in execution, or on breach of any covenants by lessee.

COVENANTS BY LESSEE.

for payment of rent,

and taxes,

and to repair the houses, and all win-

dows, and lead-work of the premises, and all locks, &c. during the term.

barns, stables, and out-buildings thereunto belonging, and all the glass windows, glazing and lead work of the same messuage, or farm-house, and premises; and all locks, keys, hinges, bolts, bars, fixtures, pumps, and the going gears thereof; and all gates, stiles, pales, posts, baltons, bridges, hedges, ditches, drains, watercourses, and inward and outward fences of every kind, of or belonging to the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof, at all times during the continuance of this demise, when need and occasion shall be or require, sufficient timber and fencing stuff being found by the person or persons for the time being entitled as aforesaid, within a reasonable distance from the place or places where the same shall be required to be used, such timber and fencing stuff to be cut and carried at the expense of the said *C B*, his executors, administrators, or assigns: AND the same messuage, or farm-house, articles, things, and premises, being so well and sufficiently upholden, repaired, supported, maintained, sustained, and amended, shall and will peaceably and quietly leave, surrender, and yield up unto the person or persons entitled to the said premises, at the end of, or sooner determination of the said term, together with such fixtures, materials, and things as are now, or shall at any time or times during the continuance of this demise, be set up and affixed within, upon, or about the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof, (reasonable use or uses thereof, and accident by fire only excepted); AND ALSO that the said *C B*, his executors, administrators, or assigns, or any of them, shall not, or will at any time or times during the continuance of this demise, transfer, assign over, or under-let to any person or persons whomsoever, the said premises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of years, without the licence or consent in writing of the person or persons for the time being entitled as aforesaid for that purpose first had and obtained; AND ALSO that he, the said *C B*, his executors, administrators, and assigns, shall not, nor will at any time or times during the continuance of this demise, plough, dig, break, or convert into tillage or garden ground, any of the fields, closes, pieces, or parcels of meadow, pasture, and marsh lands hereinbefore limited, appointed, and demised, or any part thereof respectively; AND ALSO shall not, nor will during the continuance of this demise, mow, or cause or suffer to be mowed, the fields, closes, pieces

sufficient allowance of timber being made to him,

and so to leave the same at the end of the term, together with fixtures;

not to assign or under-let the premises without consent.

And not to plough up any of the fields;

and not to

or parcels of land hereinbefore demised, or any of them, or any part thereof respectively, more than once in a year during the three last years of this demise, nor permit or suffer the same, or any part thereof respectively, to be injured or damaged by heavy cattle during the continuance of this demise; AND ALSO shall and will so manage and cultivate the arable lands, (parcel of the said premises hereinbefore limited, appointed, and demised) at all times during the continuance of this demise, that no more than two successive crops of corn, pulse, or grain, and those two not of the same kind, shall be had or taken from off the same, or any part or parts thereof, without giving the same a clear summer fallow, or sowing the same with turnips in the ensuing year, and with the next crop after such turnips, laying down the same land in an husband-like manner, with a sufficient quantity of sound clover and other grass seeds, and continuing the same so laid down two years, to be computed from the *Midsummer* day next after sowing the same seeds; AND ALSO shall and will yearly, and every year during the said term, inbarn or stock on the said premises, all the corn and grain which shall grow or arise therefrom, and there thrash the same, and feed and fodder cattle, or otherwise spend or consume on the said premises all the straw, colder, chaff, and clover arising therefrom, and also all the hay and turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter corn straw that shall be wanted for thatching and daubing work; also except half the hay and clover which shall arise in the last year of this demise, and the whole of the straw, chaff, and colder arising from the corn in the said last year, which half of the hay, and the entirety of which straw, chaff, and colder shall be left upon the said premises for the benefit of the person or persons for the time being entitled as aforesaid, or his, her, or their succeeding tenant or tenants of the said premises; which hay, however, is to be so left upon the premises only for the purpose of giving an option to such person or persons, his, her, or their succeeding tenant or tenants of becoming the purchaser or purchasers thereof at so much money as the same shall be reasonably worth in the judgment of two judicious persons, one of them to be chosen by the said *C B*, his executors, administrators, and assigns, and the other of them to be chosen by the person or persons taking the same; and in case such two persons so chosen shall disagree as to the amount of such valuation, then the same

mow the lands oftener than once a year in the latter years, nor suffer the same to be injured by cattle during the term.

Not to take more than two successive crops, and those two not of the same kind,

and to use the straw, &c. there,

with exceptions.

Landlord and succeeding tenant to have an option to purchase the hay left on the premises, at a valuation.

Also to spend all the dung made during the term on the premises,

shall be referred to the valuation of a third judicious person, to be chosen by the two first chosen, and the valuation to be made shall be binding and conclusive upon all the said parties; AND ALSO shall and will spend and lay in an husband-like manner, where the same shall be most wanted, all and every the dung, manure, muck, and compost that shall arise and be made during the continuance of this demise, from the hay, straw, and clover, colder, tares, vetches, and turnips that shall be so spent and consumed on the said premises as aforesaid, except the dung, manure, and compost that shall arise and be made therefrom in the last year of this demise, and during the time that shall elapse between the end of this demise, and the first day of *May* then next ensuing, and shall and will turn in heaps, and leave in the yards, or some other convenient part of the said premises hereinbefore limited, appointed, and demised, the dung, manure, muck, and compost so excepted as aforesaid, except such part thereof as shall be used for preparing turnips for the benefit of the person or persons for the time being entitled as aforesaid, or his or their succeeding tenant or tenants of the same premises, without any allowance being made to him or them in respect of the same; AND ALSO that he, the said *C B*, his executors, administrators, or assigns, shall and will yearly, and every year during the continuance of this demise, in an husband-like manner, cut, scour, or cause and procure to be cut and scoured yards of the fences and ditches upon such part of the arable land hereinbefore limited, appointed, and demised; and roods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scouring, and do, or cause to be done, all such outhawking, banking, and planting necessary for that purpose, being allowed bushes, thorns, and other fencing, sufficient, to be taken from the premises; AND the said *E H* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said *C B*, his executors, administrators, and assigns, that he, the said *C B*, his executors, administrators, and assigns, paying the said yearly rent of £875, hereinbefore reserved, as the same shall become due and payable in manner and form aforesaid, and well and truly observing, performing, fulfilling, and keeping all and singular the covenants and agreements hereinbefore contained, on his and their parts to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, shall

and so leave the same.

Also to scour ditches, and cut fences.

Covenant by husband with lessee for quiet enjoyment.

or lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said messuage or farm-house, and other premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with their appurtenances, during the said term of 21 years, without the lawful let, suit, trouble, or hinderance of or by the person or persons for the time being entitled as aforesaid, or any person or persons whomsoever lawfully claiming or to claim by, from, under, or in trust for such person or persons, or any of them. IN WITNESS, &c.

No. III.

A Mortgage in fee of the Wife's Estate (a).

Parties.

RECITALS.

Recites the seisin in fee of the wife or the husband in her right.

The application for loan, and the agreement of the mortgagee to lend.

WITNESSETH,

The consideration.

Grant and release by husband and wife to mortgagee.

Reference to lease for a year.

THIS INDENTURE made, &c. between *A B*, of and *C* his wife, of the one part, and *E F*, of of the other part: WHEREAS the said *C B*, or the said *A B* in her right, is seised or entitled for an estate of inheritance in fee simple in possession of, or to the lands and other hereditaments hereinafter particularly described, and intended to be hereby granted and released with their appurtenances: AND WHEREAS the said *A B* having occasion for the sum of £1000, hath applied to the said *E F* to advance and lend him the same, which he the said *E F* hath agreed to do, upon having the repayment thereof, with interest, after the rate of £5 per cent. per annum, secured to him in the manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £1000 of lawful money of Great Britain, at or immediately before the sealing and delivery of these presents in hand well and truly paid by the said *E F* to the said *A B*, with the privity and approbation of the said *C*, his wife, (testified by her being a party to and sealing and delivering of these presents) the receipt and payment of which said sum of £1000 they the said *A B*, and *C* his wife, do and each of them doth hereby admit and acknowledge, and of and from the same and every part thereof do, and each of them doth acquit, release, and discharge the said *E F*, his heirs, executors, and administrators for ever by these presents: They the said *A B*, and *C* his wife, HAVE, and each of them HATH, granted, bargained, sold, released, and confirmed, and by these presents DO and each of them DOTH grant, bargain, sell, release, and confirm unto the said *E F* (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said *A B*, and *C* his wife, in consideration of 5*s*. a piece, by an indenture bearing date the day next before the day of the date of these

(a) Vide Vol. I. p. 161.

presents, for the term of one whole year, commencing from the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession) and to his heirs and assigns: ALL those pieces or parcels of land, &c. (the parcels): AND all mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances, whatsoever to the said pieces or parcels of land, hereditaments, and premises belonging, or in any wise appertaining, or with the same, or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any of them, or appurtenant thereunto, with their and every of their appurtenances; and the reversion and reversions, remainder and remainders, yearly, and other rents, issues, and profits of all and singular the said pieces or parcels of land, hereditaments, and premises hereby granted and released, or intended so to be: AND all the estate, right, title, interest, inheritance, reversion, use, trust, property, claim, and demand whatsoever, both at law and in equity of them the said *A B*, and *C* his wife, or either of them, of, in, and to the same premises, and every part and parcel thereof: TO HAVE AND TO HOLD the said lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, unto the said *E F*, his heirs and assigns, to the use of the said *E F*, his heirs, and assigns for ever: Subject nevertheless to the proviso or condition, covenant, and agreement hereinafter contained for redemption of the same premises: AND for the considerations aforesaid, and for more effectually conveying and assuring the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, he the said *A B* doth hereby for himself, and for the said *C* his wife, her heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his heirs, executors, administrators, and assigns, that they the said *A B*, and *C* his wife (she hereby consenting thereto), shall and will, at the costs and charges of the said *A B* as of *Michaelmas* term last, or before the end of *Hilary* term now next ensuing, acknowledge and levy before his Majesty's justices of the court of *Common Pleas* at *Westminster*, unto the said *E F*, and his

The parcels.

General words.

HABENDUM.

To the use of the mortgagee in fee.

Subject to redemption.

Covenant by the husband that his wife shall join him in levying a fine.

assigns, *a fine sur conuzance de droit come ceo*, &c. whereupon proclamations shall be had and made according to the statute in that case made and provided, and the usual course, order, and manner of fines for assurance of lands in like cases, used and accustomed of all the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, by such names, quantities, qualities, and descriptions, as shall be sufficient to ascertain and comprise the same: AND it is hereby agreed and declared between and by the parties to these presents, that the said fine so as aforesaid, or in any other manner or at any other time, to be acknowledged and levied, and all and every other fine and fines whatsoever, already acknowledged and levied, and hereafter to be acknowledged and levied of the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, or any part thereof, by or between the parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall operate and enure, and be adjudged, deemed, construed, and taken to operate and enure, to the use of the said *E F*, his heirs and assigns for ever: BUT SUBJECT, nevertheless, to the proviso or condition, covenant and agreement hereinafter contained for redemption of the same premises: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless is, that if the said *A B*, and *C* his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, shall and do, well and truly pay or cause to be paid to the said *E F*, his executors, administrators, or assigns, the sum of £1000 of lawful money of *Great Britain*, and the sum of £50 of like lawful money, as and for one year's interest of the same, at the rate of £5 for £100 for a year, making together the sum of £1050, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of £25, part thereof (being half a year's interest for the said sum of £1000 at the rate aforesaid), on the day of next ensuing the date of these presents, which will be in the year of our Lord 18 and the sum of £1025 residue thereof, being the whole of the said principal sum of £1000, and another half year's interest for the same at the rate aforesaid, on the day of then next following, which will be in the year 18 without any deduction or abatement whatsoever out of

Declaration that the fine and all other fines by the said parties,

shall enure, to the use of the mortgagee in fee, subject to redemption.

Proviso for redemption.

the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions taxed, charged, assessed, or imposed upon, or to be taxed, charged, assessed, or imposed upon the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or upon the said sum of £1050, or any part thereof, or upon the said *E F*, his heirs, executors, administrators, or assigns, for or on account or in respect of the said lands, hereditaments, and premises, or any of them, or of the said sum of £1050 or any part thereof, by authority of parliament or otherwise howsoever, or for upon account or in respect of any other matter, cause, or thing whatsoever: Then and in such case he the said *E F*, his heirs or assigns, shall and will, at any time after such payment shall be so made as aforesaid, upon the request and at the proper costs and charges of the said *A B*, and *C* or either of them, his or her heirs or assigns, reconvey the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto the said *C B*, her heirs and assigns, or as she or they, or other the person or persons for the time being intitled to the equity of redemption of and in the said mortgaged premises, shall in that behalf order or direct, free from all incumbrances whatsoever, made, done or committed by the said *E F*, his heirs, executors, administrators, or assigns, or any of them, so as for the doing thereof the said *E F*, his heirs, executors, administrators, or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, their, or any of their usual abode or dwelling. AND the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his executors, administrators, and assigns, that he the said *A B*, or the said *C B* his wife, or one of them, their or one of their heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said *E F*, his executors, administrators, or assigns, the aforesaid sum of £1050 in the parts, shares, or proportions, and on or at the days or times in the aforesaid proviso or agreement mentioned or appointed for payment thereof respectively, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents: AND the said *A B* doth for himself, his heirs, executors, and administrators covenant, promise, grant, and agree with and to the said *E F*, his heirs and assigns, by these

Covenant by the husband to pay the mortgage money and interest according to the proviso for redemption,

that he and wife, or one of them, have or hath good right to convey, &c.

presents in manner following (that is to say), that he the said *A B*, and the said *C*, his wife, or one of them, now have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and convey the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto, and to the use of the said *E F*, his heirs, and assigns, in manner aforesaid, according to the true intent and meaning of these presents; AND ALSO, that if default shall be made in payment of the said sum of £1050, or any part thereof, contrary to the aforesaid proviso or agreement for payment of the same, and the true intent and meaning of these presents, then and in such case it shall and may be lawful to and for the said *E F*, his heirs and assigns, at any time or times thereafter, into and upon all and every the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues and profits thereof, to and for his and their own use, without any let, trouble, interruption, or disturbance whatsoever of, from, or by the said *A B*, and *C* his wife, or either of them, their or either of their heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, in or to the said lands, hereditaments, and premises, or any of them, or any part or parts thereof; AND that free and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by the said *A B*, his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, intails, annuities, rent charges, rents seck, and arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, and incumbrances whatsoever: AND MOREOVER, that if default shall be made of, or in payment of the aforesaid sum of £1050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case he the said *A B*, and *C* his wife, and each of them, their, and each of their heirs, and

And that in default of payment of mortgage money, mortgagee may enter and enjoy, &c.

Free from incumbrances.

That husband and wife and all other persons lawfully or equitably claiming, will do all acts for further assurance.

all and every other persons and person whomsoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest of, in, or to the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times thereafter, upon the request of the said *E F*, his heirs or assigns, but at the costs and charges of the said *A B*, his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances, and assurances in the law whatsoever for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto the said *E F*, his heirs and assigns, as by the said *E F*, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required. PROVIDED ALSO, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless further is, that it shall and may be lawful to and for the said *A B*, and *C* his wife, their heirs and assigns, or other the person or persons for the time being entitled to the equity of redemption of or in the said mortgaged premises, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof to his and their own use and benefit, until default shall be made in payment of the said sum of £1050, or some part thereof, contrary to the aforesaid proviso or covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever of, from, or by the said *E F*, his heirs or assigns, or by any other person or persons whomsoever, lawfully, claiming or to claim by, from, or under him, them, or any of them. IN WITNESS, &c.

Agreement that the mortgagors shall enjoy until default in payment of mortgage money and interest, according to the proviso for redemption.

No. IV.

Further Charge on the Hereditaments comprised in last Precedent by Indorsement thereon (*a*).

Parties

Recites, default made in payment of the money secured by within indenture.

That principal money thereby secured was still due, but all interest paid.

Application for further loan.

Agreement to lend.

Payment of money agreed to be lent.

Acknowledgment of such payment by husband and wife.

First operative part.

THIS INDENTURE made, &c. between the within named *A B*, and the within named *C*, his wife, of the one part, and the within named *E F*, of the other part: WHEREAS default was made in payment of the within mentioned sum of £1050 at the time in the within written indenture mentioned or appointed for payment thereof; and the whole of the within mentioned principal sum of £1000 still remains due and owing on the security of the within written indenture, but all interest for the same hath been duly paid up to the day of the date of these presents, as the said *E F* doth hereby admit and acknowledge. AND WHEREAS the said *A B* having occasion for the further sum of £600, hath applied to and requested the said *E F* to advance and lend him the same, which he the said *E F* hath agreed to do, upon having the same sum of £600, with interest for the same, after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned. AND WHEREAS, in pursuance of the said agreement in this behalf, he the said *E F* hath this day paid to the said *A B* the said sum of £600, with the privity and approbation of the said *C B* (testified by her being a party to and sealing and delivering these presents), as they the said *A B*, and *C* his wife, do hereby admit and acknowledge. NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, he the said *A B* doth hereby for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F*, his executors, administrators, and assigns, that he the said *A B*, and *C* his wife, or one of them, their or one of their heirs, executors, administrators, or assigns, shall and will, on or before the day of now next ensuing, well and truly pay or cause to be paid to the said *E F*, his executors, administrators, or assigns, the said sum of £600, with interest for the same after the rate

(*a*) Vide Vol. I. p. 161.

of £5 for £100 by the year, free from all deductions or abatements whatsoever. AND THIS INDENTURE ALSO WITNESSETH, that for the considerations aforesaid, and for further securing the said sum of £600 and interest, he the said *A B* doth hereby for himself, and for the said *C* his wife, her heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his heirs, executors, administrators, and assigns, that they the said *A B*, and *C* his wife, (she hereby consenting thereto) shall and will at the costs and charges of the said *A B*, as of *Michaelmas* Term last, or before the end of *Hilary* Term now next ensuing, acknowledge and levy before his majesty's justices of his Court of *Common Pleas*, at *Westminster* unto the said *E F*, and his heirs, *a fine sur conuzance de droit come ceo*, &c. whereupon proclamations shall be had and made according to the form of the statute in that case made and provided, and the usual course, order, and manner of fines for assurance of lands in like cases used and accustomed, of all the within mentioned lands and other hereditaments, with their appurtenances by such names, quantities, qualities, and descriptions as shall be sufficient to ascertain and comprise the same. AND it is hereby agreed and declared, between and by the parties to these presents, that the said fine so as aforesaid, or in any other manner or at any other time to be acknowledged and levied, and all and every other fine and fines whatsoever already acknowledged and levied of the said lands, hereditaments, and premises, or any of them, or any part thereof, by or between the parties to these presents, or any of them, or whereunto they or any of them shall be parties or privies, shall operate and enure, and be adjudged, deemed, construed, and taken to operate and enure, TO THE USE AND INTENT that the said lands and other hereditaments shall henceforth stand and be charged and chargeable with the payment, as well of the said sum of £600, and interest for the same, after the rate aforesaid, as of the said sum of £1000 and interest. And that the said lands and other hereditaments, or any of them, or any part thereof, shall not be redeemed or redeemable until payment as well of the said sum of £600, and interest for the same after the rate aforesaid, as of the said sum of £1000, and interest intended to be secured by the within written indenture, and the lease for a year upon which the same is grounded. AND the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, grant, and agree with and to the said *E F*, his heirs, executors,

Second operative part.

Covenant by husband that wife shall join him in levying a fine.

Declaration that the fine and all other fines by the same parties

shall enure to the use and intent that the hereditaments shall stand charged with the payment of the further loan and interest as well as the first.

Covenants by husband, that he and his wife, or one

of them, had good right to charge.

administrators and assigns, in manner following (that is to say), that they the said *A B*, and *C* his wife, or one of them, now have or hath in themselves, himself or herself, good right, full power, and lawful and absolute authority to charge, and make chargeable the said lands and other hereditaments hereinbefore charged and made chargeable in manner aforesaid, according to the true intent and meaning of these presents: AND FURTHER,

And that they and all other persons claiming any interest in the hereditaments shall do all acts for better charging which shall be required by the mortgagee or his counsel.

that they the said *A B*, and *C* his wife, and each of them, their and each of their heirs, and all and every other persons and person whomsoever, having or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the said lands and other hereditaments hereinbefore charged and made chargeable, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times hereafter, upon the request of the said *E F*, his heirs, executors, administrators, or assigns, but at the costs and charges of the said *A B*, his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other reasonable acts, deeds, and assurances in the law whatsoever, for the further and more effectually charging and making chargeable all the said lands and other hereditaments hereinbefore charged and made chargeable, or expressed and intended so to be, with their appurtenances, as by the said *E F*, his heirs, executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably advised or devised and required. IN WITNESS, &c.

No. V.

Assignment of the Wife's Term for Years by the Husband (*a*).

THIS INDENTURE made the day of , &c.: Between *A B*, of and *F* his wife (*b*) (before her marriage *F T*, spinster), of the one part, and *C D* of of the other part: WHEREAS by an indenture bearing date the day of and made or expressed to be made between *J H* of the one part, and the said *F B* (then *F T*, spinster) of the other part: For the considerations therein mentioned, the said *J H* did demise and lease unto the said *F B*, her executors, administrators, and assigns, ALL THAT messuage, &c. with the appurtenances; to hold the same unto the said *F B*, her executors, administrators, and assigns, from the day of then last past, for and during the full end and term of 99 years, from thence next ensuing, and fully to be complete and ended, at, under, and subject to the rent, covenants, and agreements therein reserved and contained on the part of the said *F B*, her executors, administrators, and assigns, to be paid, observed, performed, and kept: AND WHEREAS the said *A B*, with the privity and approbation of the said *F*, his wife, hath contracted and agreed with the said *C D* for the absolute sale to him, the said *C D*, of the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of lease for the residue now to come and unexpired of the said term of 99 years, at or for the price or sum of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £ of lawful money of *Great Britain* to the said *A B* in hand well and truly paid by the said *C D* at or before the sealing and delivery of these presents (the receipt whereof he the said *A B* doth hereby admit and acknowledge, and of

Parties.

Recites, the wife's title to the term,

and the contract by the husband for the sale of the term.

The consideration.

(*a*) Vide Vol. I. p. 173.

(*b*) Although an assignment by the husband *alone* for a valuable consideration would be sufficient, yet as the most usual practice is to make the wife join with the husband, this precedent is so framed.

and from the same and every part thereof doth acquit, release, and discharge the said *C D*, his heirs, executors, administrators, and assigns for ever, by these presents), AND ALSO for and in consideration of the sum of ten shillings of like lawful money to the said *F B* in hand well and truly paid by the said *C D* at or immediately before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged): He the said *A B*, with the privity and approbation of the said *F* his wife (testified by her being a party to and sealing and delivering these presents), and also the said *F B* HAVE, and each of them HATH bargained, sold, assigned, transferred, and set over, and by these presents DO and each of them DOTH bargain, &c. unto the said *C D*, his executors, administrators, and assigns, the said messuage or tenement, and all and singular other the premises comprised in and demised by the said in part recited indenture, with their and every of their appurtenances, together with the said in part recited indenture and the full benefit thereof: AND all the estate, right, title, interest, term and terms for years, property, possibility, claim, and demand whatsoever both at law and in equity of them, the said *A B*, and *F* his wife, or either of them, of, in, to, or out of the same premises, or any part thereof: TO HAVE AND TO HOLD the said messuage or tenement, and all and singular other the premises hereby assigned, or expressed and intended so to be, with their appurtenances, unto the said *C D*, his executors, administrators, and assigns, for and during all the residue and remainder now to come and unexpired of the said term of 99 years, subject nevertheless to the payment of the rent, and to the performance and observance of the covenants and agreements in the said in part recited indenture reserved and contained, and which from henceforth on the lessees' or assignees' part and behalf are and ought to be paid, observed and performed (*a*); AND the said *A B* for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said *C D*, his executors administrators, and assigns, by these presents in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said *A B*, or the said *F* his wife, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the hereinbefore in part recited indenture of lease at the time of the seal-

The assignment.

HABENDUM.

COVENANTS by the husband, that he and his wife, or one of them, had good right to assign.

(*a*) See *Staines* v. *Morris*, 1 *Ves.* and *Bea.* 8.

ing and delivery of these presents is a good and effectual lease and demise in the law of the said premises therein comprised, and the said term of 99 years is not forfeited, merged, extinguished, surrendered, determined, or otherwise become void or voidable: AND that for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he the said *A B*, and the said *F* his wife, or one of them, now have or hath in themselves, himself or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned, or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *C D*, his executors, administrators, and assigns, for all the residue now to come of the said term of 99 years in manner aforesaid, according to the true intent and meaning of these presents: AND that it shall and may be lawful to and for the said *C D*, his executors, administrators, and assigns, from time to time and at all times hereafter during the said term of 99 years, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the premises hereby assigned or expressed and intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by him the said *A B*, and the said *F* his wife, or either of them, their or either of their executors or administrators, or by any other persons or person lawfully or equitably claiming or to claim by, from, or under or in trust for them or any of them: AND that free and clear and for ever discharged or otherwise by the said *A B*, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said *A B*, and *F* his wife, or either of them, their or either of their executors or administrators, or by any person or persons lawfully or equitably claiming or to claim by, from, under or in trust for them or any of them: AND FURTHER, that he the said *A B*, his executors and administrators, and all and every other persons or person having or claiming, or who shall or may have or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or expressed

For quiet enjoyment,

For further assurance,

and intended so to be, or any of them or any part thereof respectively, by, from, or under, or in trust for him the said *A B*, and *F* his wife, or either of them, their or either of their executors or administrators, shall and will from time to time and at all times hereafter during the said term of 99 years upon every reasonable request to be made for that purpose by and at the proper costs and charges in the law of the said *C D*, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring of the premises hereby assigned, or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said *C D*, his executors, administrators, and assigns, for the residue which shall be then to come of the said term of 99 years, as by the said *C D*, his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably devised or advised and required: AND ALSO that he the said *A B*, his executors or administrators, shall and will pay the rent reserved by the aforesaid in part recited indenture of lease, up to and including *Midsummer* day now next ensuing, and shall and will keep indemnified the said *C D*, his executors, administrators, and assigns, and his and their lands, tenements, goods, and chattels respectively from the same rent, and from all costs and expenses on account of the non-payment thereof, or on account of the breach or non-performance of any of the covenants or agreements in the said in part recited indenture on the part of the said *F B*, her executors, administrators, or assigns, to be performed from the commencement thereof: AND the said *C D* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said *A B*, his executors, administrators, and assigns, that he the said *C D*, his executors, administrators, and assigns, shall and will at all times during the continuance of the said term of 99 years pay the yearly rent reserved by the said in part recited indenture of lease from *Midsummer* day now next ensuing, and perform, fulfil, and keep all and every the covenants and agreements in the said indenture of lease contained on the part of the tenant or lessee from henceforth to be performed, and from the same rent, covenants, and agreements, and all costs and expenses on account of any breach, neglect, or default of or in payment or performance

and for payment of rent and performance of covenants up to a given time.

Covenant by assignee for payment of rent and performance of covenants after that time.

thereof as aforesaid, shall and will save harmless and keep indemnified the said *A B*, and *F* his wife, and each of them, their and each of their executors and administrators, and their lands, tenements, goods, and chattels respectively. IN WITNESS, &c.

No. VI.

An Assignment by a Husband of his Wife's Choses in Action to a Purchaser (*a*).

Parties.

THIS INDENTURE made, &c. between *A B* of , &c. and *C*, his wife (*b*) (before her marriage *C S*, spinster), of the one part, and *D F* of , &c. of the other part,

Recites the wife's title to her choses in action,

Recites a bond, whereby a sum of £100 was secured to the wife before marriage;

Also recites the will of *W S*, whereby an equal third part or share of residuary personal estate was bequeathed to the wife before marriage.

and the contract by the husband for the sale of them.

AND WHEREAS the said *A B*, with the privity and approbation of the said *C*, his wife, hath contracted and agreed with the said *D F* for the sale to him, the said *D F*, of the said bond or obligation as aforesaid, and all principal money and interest now or henceforth to become due thereon; and also of the said equal third part or share in and by the said will of the said *W S*, given or bequeathed to the said *C B* as aforesaid, of and in the residuary personal estate and effects of him the said *W S*, at or for the price or sum of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £ of lawful money, &c. to the said *A B*, &c. and for and in consideration of the sum of 10*s*., &c. to the said *C B*, &c., he, the said *A B*, with the privity and approbation of the said *C*, his wife (testified by her being a party to and executing these presents); and also the said *C B* HAVE, and each of them HATH bargained, sold, assigned, transferred, and set over, and by these presents DO, and each of them DOTH bargain, &c. unto the said *D F*, his executors, administrators, and assigns, ALL that the said sum of £1000, secured as hereinbefore is mentioned, and all interest now due, and henceforth to grow due for the same, together with the said in part recited bond or obligation, and the full benefit thereof: AND ALSO all

The consideration.

The assignment.

(*a*) Vide Vol. I. p. 238. (*b*) The same observation applies to this precedent with respect to the necessity of making the wife a party, as stated in note (*b*) to the preceding assignment.

that the said equal third part or share to which she the said *C B* became entitled as hereinbefore is mentioned, of and in the residuary personal estate and effects of the said *W S*, AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of them the said *A B*, and *C*, his wife, or either of them, of, in, or to the same premises respectively, or any part thereof respectively, WITH full power and authority to ask, sue for, recover and receive, and to give effectual receipts and discharges for the said principal monies, and interest, and premises hereinbefore assigned, and every or any part thereof respectively, in the names or name of the said *A B*, and *C*, his wife, or either of them: TO HAVE, HOLD, receive, take, and enjoy the said sum of £1000, and interest; AND the said equal third part or share, and premises hereinbefore assigned, or expressed and intended so to be, unto the said *D F*, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely; AND the said *A B* for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with, and to the said *D F*, his executors, administrators, and assigns, by these presents, in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said *A B*, or the said *C*, his wife, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, they, the said *A B*, and *C*, his wife, or one of them, now have or hath in themselves, himself or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *D F*, his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents: AND FURTHER that he, the said *A B*, and *C*, his wife, their, and each of their executors and administrators, and all and every other persons or person having or claiming, or who shall, or may have, or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or expressed and intended so to be, or any of them, or any part thereof respectively, by, from, or under, or in trust for him, the said *A B*, or the said *C*, his wife, or either of them, their, or either of their executors or administrators, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose by and at the proper

HABENDUM.

COVENANTS by the husband, that he and his wife, or one of them, had good right to assign,

and for further assurance.

costs and charges in the law of the said *D F*, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever for the further, better, more perfectly and absolutely assigning and assuring of the premises hereby assigned or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said *D F*, his executors, administrators, and assigns, as by the said *D F*, his executors, administrators, or assigns, or his, or their counsel in the law shall be reasonably devised, or advised and required. IN WITNESS, &c.

No. VII.

A Settlement before Marriage of personal Property by the Husband on his intended Wife (*a*).

THIS INDENTURE made, &c. between *A B* of , of the first part, *C D* of , spinster, of the second part, and *E F* of , and *G H* of , of the third part: WHEREAS a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said *A B* and *C D*: AND WHEREAS by an instrument or policy of assurance, bearing date the day of , and numbered , under the hands and seals of two of the trustees of the society for equitable assurance on lives and survivorships, the sum of £ is assured to be paid out of the stock or funds of the said society to the executors, administrators, or assigns of the said *A B* within six calendar months after the expiration of the first year of the time of the said assurance, in case the said *A B* shall die within such year; or if the said *A B* shall die after the expiration of such first year, then within six calendar months next after the proof of the death of the said *A B* shall be made according to the rules and practice of the said society, at and under the annual premium of £ : AND WHEREAS, upon the treaty for the said intended marriage, it was agreed that the said *A B* should transfer the sum of £2000 3 *per cent.* reduced bank annuities to the said *E F* and *G H*; and that the said *E F* and *G H*, their executors, administrators, and assigns, should stand, and be possessed of, and interested in the said sum of £2000 3 *per cent.* reduced bank annuities; and the said instrument or policy of assurance upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter declared or contained, of and concerning the same respectively: AND WHEREAS upon the treaty for the said marriage, and in consideration thereof, and of the settlement hereby intended to be made by the said *A B*, it was agreed between the said *A B* and *C D*, that all the personal estate to which the said *C D* now is, or to which she, or the said *A B* in her

Parties.

Recites the intended marriage, and a policy of assurance on the husband's life,

The husband's agreement to settle stock,

and the policy of assurance.

Also recites an agreement that all the then and future personal estate of wife should be the absolute property of husband;

(*a*) See Vol. I. p. 289.

right, shall or may become entitled during the said intended coverture, shall, in case the said intended marriage shall take effect, become and be the absolute property of him the said *A B*: AND WHEREAS in pursuance and part performance of the aforesaid agreement in this behalf, the said *A B* hath this day transferred the sum of £2000 3 *per cent.* reduced bank annuities into the names of the said *E F* and *G H* in the books kept by the governor and company of the Bank of *England*, for entering transfers of the same stock: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the aforesaid agreement in this behalf, and in consideration of the said intended marriage, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain*, to the said *A B* paid by the said *E F* and *G H*, at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said *A B*, with the privity and approbation of the said *C D* (testified by her being a party to, and sealing and delivering these presents), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F* and *G H*, ALL that the said instrument or policy of assurance, and the full benefit and advantage thereof, and all and every sums and sum of money to be had, or received, or become due or payable by virtue of the same; AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said *A B*, of, in, to, from, out of, or upon the same premises, and every of them, and every part thereof: TO HAVE, HOLD, receive and take the said instrument or policy of assurance, sums and sum of money, and all and singular other the premises hereinbefore assigned or expressed and intended so to be unto the said *E F* and *G H*, their executors, administrators and assigns, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter declared or contained of and concerning the same; AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and further performance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators, and assigns, shall stand and be possessed of, and interested in the said sum of £2000 3 *per cent.* reduced bank annuities, so this day transferred to them the said *E F* and *G H* as hereinbefore is men-

and that the husband had transferred the stock into the names of the trustees.

THE ASSIGNMENT of

policy of assurance

to the trustees upon the trusts after declared.

The parties agree and declare, that the trustees shall stand possessed of the stock, and dividends, &c. upon trust for the husband until marriage, and afterwards

tioned, and of and in the dividends, interest and annual produce thereof, in trust for the said *A B*, his executors, administrators and assigns in the mean time, and until the said intended marriage shall be had and solemnized; and from and after the solemnization thereof, upon trust, that they the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall either permit and suffer the said sum of £2000 3 *per cent.* reduced bank annuities to remain in their actual state of investment, or do and shall at any time or times (with the consent in writing of the said *A B* and *C D*, his intended wife, during their joint lives, and after the decease of either of them with the consent in writing of the survivor of them, during his or her life, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being), sell, transfer or dispose of the same, or any part or parts thereof, for such price or prices as they or he shall think fit, AND do, and shall (with such consent, or at such discretion as aforesaid), lay out or invest the money to arise by or from such sale, transfer or disposition, in their or his names or name, in the purchase of a competent share, or competent shares, of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall, from time to time (with such consent, or at such discretion as aforesaid), alter, vary and transpose the said stocks, funds and securities, as to them or him shall seem proper; AND do and shall stand, and be possessed of, and interested in all and singular the said trust monies, stocks, funds and securities, and the dividends, interest and annual produce thereof, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter declared or contained of or concerning the same (that is to say) UPON TRUST, that they the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, from time to time, in the first place, by and out of the dividends, interest and annual produce of the said trust-monies, stocks, funds and securities, pay the annual premium upon the said policy of assurance hereinbefore assigned or expressed and intended so to be, so as to keep the same on foot during the life of the said *A B*, and (subject, and without prejudice, to the payment of the annual premium upon the said instrument or policy of assurance), do and shall pay the dividends, interest and annual produce of the said trust-monies, stocks, funds and securities to, or permit the same to be received by the said *A B*, and his

upon trust, either to permit the stock to remain as invested,

or to sell the same,

and invest produce in purchase of other stock, or upon government or real securities,

with power to vary securities, and to stand possessed of the trust-monies, &c. and dividends, &c.

upon trust, out of the dividends to pay the annual premium of the policy of assurance,

and subject thereto,

to pay the dividends to husband for

life, and after his decease to wife for life, and after the decease of the survivor,

assigns, during his natural life, and after his decease, to or by the said *C D*, and her assigns, during her natural life; AND after the decease of the survivor of them, the said *A B* and *C D*, do and shall stand, and be possessed of, and interested in the said trust-monies, stocks, funds and securities, and the dividends, interest and annual produce thereof, IN TRUST for all and every the children and child of the said *A B* by the said *C D*, his intended wife, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to be divided between or among such children if more than one, in equal shares or proportions, and if there shall be but one such child, the whole to be in trust for that one child: PROVIDED always, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times after the decease of the said *A B*, and during the lifetime of the said *C D*, in case she shall so direct, by any writing or writings under her hand, to levy and raise any part or parts of the expectant portion or portions of any child or children of the said intended marriage, under the trusts aforesaid, not exceeding in the whole for any one such child one moiety or equal half part or share of his or her expectant portion, and to pay and apply the same for his, her, or their preferment, advancement or benefit, in such manner as the said *E F* and *G H*, or the survivor of them, or the executors, administrators or assigns of such survivor shall in their or his discretion think fit, notwithstanding the portion or portions of such child or children shall not then have become vested or payable; AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *H G*, and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, after the decease of the survivor of them, the said *A B* and *C D*, pay and apply the whole, or such part as the said *E F* and *G H*, or the survivor of them, or the executors, administrators and assigns of such survivor shall think fit, of the dividends, interest or annual produce of the portion or respective portions to which any child or children of the said intended marriage shall or may, for the time being, be entitled in expectancy, under the trusts aforesaid, for or towards his, her, or their maintenance and education respectively, in the mean time, and until his, her or their portion or portions respectively shall become payable: PROVIDED always, and it is hereby agreed and

in trust for the children in equal shares, sons' shares payable at 21, the daughters' shares at that age or marriage; if but one child, the whole to that one child.

Power for trustees, by direction of wife, to raise parts of expectant portions of children, not exceeding in the whole one half for the children's advancement;

and after the decease of the survivor of husband and wife,

to pay parts of children's portions for their maintenance, &c.;

declared between and by the parties to these presents, that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then and in such case the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, from and after the decease of the said *C D*, and such default or failure of issue of the said intended marriage as aforesaid, stand and be possessed of and interested in all and singular the said trust-monies, stocks, funds, and securities, and the dividends, interest and annual produce thereof, or such part thereof respectively as shall not have been applied or disposed of under any of the trusts, powers or authorities aforesaid, IN TRUST for the said *A B*, his executors, administrators and assigns, for his and their proper use and benefit; AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators and assigns, shall stand and be possessed of, and interested in the said instrument or policy of assurance, and other the premises hereinbefore assigned or expressed and intended so to be, in trust for the said *A B*, his executors, administrators and assigns in the mean time, and until the said intended marriage shall be had and solemnized; and from and after the solemnization thereof, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter expressed or declared, of and concerning the same (that is to say), UPON TRUST, that they, the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall after the decease of the said *A B*, call in and receive the sum or sums of money which shall or may become due or payable under or by virtue of the said instrument or policy of assurance; AND do and shall lay out or invest the same, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall, from time to time (with the consent of the said *C D* during her life, and after her decease, at the discretion of the said trustees or trustee for the time being), alter, vary and transpose the same stocks, funds or securities as to them or him shall seem proper, AND do and shall stand and be possessed of and interested in the sum or sums of money to become payable by virtue of or

and in case there shall be no child, to attain a vested interest

in trust for the husband absolutely.

And as to the policy of assurance in trust for the husband until the marriage, and afterwards

upon trust.

after decease of husband, to call in the money payable thereon,

and invest the same upon government or real securities,

with power to vary securities, and to stand possessed of the money payable under

the policy, and the securities upon which the same should be invested, and the dividends, &c. upon the same trusts as before declared of the stock and dividends, &c.

under the said instrument or policy of assurance as aforesaid, and the stocks, funds or securities in or upon which the same shall be laid out or invested, and the interest, dividends and annual produce thereof, upon and for such of the trusts, intents and purposes, and with, under and subject to such of the powers, provisoes, agreements and declarations hereinbefore declared or contained of or concerning the said sum of £2000 3 *per cent.* reduced bank annuities, and the dividends and annual produce thereof as shall or may be subsisting or capable of taking effect.

Agreement, that the provision made for the wife, shall be in bar of dower, &c.

AND it is hereby agreed and declared between and by the parties to these presents, that the provision hereinbefore made for the said *C D* is so made for her as aforesaid, and she doth hereby accept the same in lieu, bar and satisfaction of the dower or thirds and freebench, to which by the common law, or by custom, or otherwise, she, the said *C D*, may or otherwise might have become entitled out of or in any lands or hereditaments of which the said *A B* shall or may at any time during the said intended coverture be seised for any estate of inheritance, or for any estate to which dower or freebench is incident:

Declaration that the receipts of the trustees shall be sufficient discharges.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F* and *G H*, or the survivor of them, or the executors, administrators or assigns of such survivor, for any sum or sums of money payable to them or him, under or by virtue of these presents, or in, or about the execution of any of the trusts or powers hereinbefore contained, shall be a sufficient and effectual discharge or sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received; and that the person or persons to whom the same shall be given, his, her or their heirs, executors, administrators or assigns, shall not afterwards be answerable or accountable for any loss, misapplication or non-application, or be in anywise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received:

Power to appoint new trustees.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or either of them, as hereinafter is mentioned, shall happen to die, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before

the said trusts shall be fully executed, performed and discharged, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *A B* and *C D*, his intended wife, or the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them, him or her, in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust-monies and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, assigned and transferred in such sort and manner, and so that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust-monies and premises respectively, and such new or other trustee or trustees, or, if there shall be no continuing trustee or trustees of the same trust-monies and premises, then in such new trustee or trustees only upon the same trusts as are hereinbefore declared of and concerning the same trust-monies and premises respectively, (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect; and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust-monies and premises respectively, if there shall be any such continuing trustee or trustees, if not, then by himself or themselves as fully and effectually, and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out, and investing, giving and signing receipts, and effectual indemnifications and discharges, and all other powers and authorities whatsoever, to all intents, effects, constructions

and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their executors or administrators in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed, or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the executors, administrators and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving, or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker or other person with whom, or in whose hands any part of the said trust-monies shall or may be deposited or lodged for safe custody or otherwise in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks or funds, in or upon which the said trust-monies or any part thereof shall be placed out or invested, nor for any other misfortune, loss or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: AND ALSO that it shall and may be lawful to and for them, the said trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their executors, administrators and assigns, by and out of the monies which shall come to their respective hands, by virtue of the trusts aforesaid, to retain to

Clause to indemnify the trustees.

and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees, all costs, charges, damages and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto. IN WITNESS, &c.

No. VIII.

A Power to jointure contained in a Will (*a*).

PROVIDED ALWAYS, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son *H V A*, or any son or sons I may hereafter have by my said wife, when, and as under, and by virtue of the limitations hereinbefore contained, they shall severally and respectively be in the actual possession of or entitled to the first estate of freehold of and in the said capital messuage or mansion-house and other hereditaments hereinbefore devised, or expressed and intended so to be, either before or after their respective marriages with any woman or women with whom they respectively may intermarry, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them respectively sealed and delivered in the presence of, and to be attested by two or more credible witnesses, or by their respective last will and testament in writing, or any codicil or codicils thereto, and to be signed and published in the presence of, and to be attested by three or more credible witnesses, to GRANT, LIMIT AND APPOINT unto and to the use of, or in trust for any such woman or women whom they shall respectively so marry, for her or their life or lives, and for her or their jointure or jointures, and in bar, or without being in bar of her or their dower, any annual sum or yearly rent charge, or annual sums or yearly rent charges, not exceeding in the whole the sum of £500, unless the portion or fortune of such woman or women respectively shall exceed in amount or value the sum of £5000; and if the portion or fortune of such woman or women respectively shall exceed in value the sum of £5000, then such annual sum or yearly rent charge as shall be equal to £10 *per cent. per annum* on the amount or value of such portion or fortune, not exceeding in the whole the annual sum of £1000 by the year for any such woman, tax free, and without any deduction, and to commence and

For testator's son, *H V A*, or any other of his sons when in possession

of the devised hereditaments before or after marriage

by deed, to be sealed and delivered and attested by two witnesses,

or by will, to be signed, and published, and attested by three witnesses,

to *appoint* to any wife for her jointure an annual sum or yearly rent charge of 500*l.* unless their wife's fortune shall exceed 5000*l.*;

and then such annual sum, &c. as shall be equal to 10*l. per cent. per annum* on the amount of such fortune, tax free; and to commence im-

(*a*) Vide Vol. I. p. 496.

take effect immediately after the decease of the person making any such grant, limitation and appointment, and to be issuing and payable out of, and charged, and chargeable upon all or any part or parts of the said capital messuage or mansion-house, and other hereditaments hereby devised, together with such powers and remedies for recovering the same when in arrear, and for defraying all costs and expenses occasioned by the non-payment thereof, as to the person making such grant, limitation and appointment shall seem meet; AND ALSO to GRANT, DEMISE, LIMIT OR APPOINT all or any of the same capital messuage or mansion-house, and other hereditaments, to any person or persons for any term or terms of years, to take effect immediately after the decease of the person making any such grant, limitation or appointment for better securing the due payment of such rent charge as to them respectively shall seem meet, so as such term or terms of years be made determinable on the ceasing of the rent charge or rent charges thereby secured, and the payment of all arrears thereof, and of all costs, charges and expenses occasioned by the non-payment thereof: PROVIDED ALWAYS, and I do hereby further declare my will and mind to be, that the said capital messuage or mansion-house, and other hereditaments hereby devised, shall not, under or by virtue of the power hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums for jointures exceeding in the whole the sum of £1500, so that if, under the power of jointuring hereinbefore contained, the said capital messuage or mansion-house and other hereditaments, or any part or parts thereof would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole than the said annual sum of £1500, the payment of the annual sum or sums, by reason of the charging or granting whereof such excess shall have been occasioned, or such part thereof as shall occasion the same, shall during the time of such excess be suspended.

mediately after the decease of the person making such jointure, and to be charged upon the devised hereditaments,

with powers and remedies for recovering the same when in arrear;

and also to grant and demise the devised hereditaments for a term, to take effect immediately after the decease of the person making such grant, &c. so as such term be determinable on the ceasing of the rent charge:

PROVIDED that the devised hereditaments shall not at any one time be liable to the payment of annual sums for jointures, exceeding in the whole 1500*l*.

No. IX.

Settlement by Husband to secure to Wife Pin-money; also a Jointure under the preceding power (a).

Parties.

THIS INDENTURE made, &c. Between *H V A* of of the first part, *E T M* of of the second part, *J B* of *A B* of *H G* of and *J C* of of the third part:

Recitals.

RECITES the will of *H W A*, whereby the estates hereinafter demised were devised to the said *H V A* for life, with remainder to his sons, &c. in tail, with the power of jointuring hereinafter exercised: AND RECITES the death of the testator:

Also recites, the intended marriage, and husband's agreement to secure to wife's separate use the clear yearly sum of 400*l.* by way of *pin money*,

AND WHEREAS a marriage hath been agreed upon, and is intended shortly to be had and solemnized between the said *H V A* and the said *E T M*: AND WHEREAS upon the treaty for the said intended marriage it was agreed (among other things) that the said *H V A* should secure out of the messuages or tenements, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby demised and appointed, the clear yearly sum of £400 of lawful money of *Great Britain*, for the separate use of the said *E T M* BY WAY OF PIN MONEY during the joint lives of herself and him the said *H V A*, and should also, in exercise of the aforesaid power given to him by the said will of his said late father in that behalf, limit and secure to her the said *E T M* and her assigns during her life, in case she shall survive him, the said *H V A*, a clear annual sum or yearly rent charge of £1000 of like lawful money to be issuing out of and charged upon the same messuages or tenements, lands, and hereditaments, BY WAY OF JOINTURE and in bar of her dower: NOW THIS INDENTURE WITNESSETH that in performance of the said agreement in this behalf, and in consideration of the said intended marriage, and also for and in the consideration of the sum of

and also a yearly rent charge of 1000*l.* for her *jointure*.

WITNESSETH that in performance of his agreement, husband with the privity of wife,

(*a*) Vide Vol. I. p. 488.

10*s.* of lawful money of *Great Britain* to the said *H V A* by the said *J B, A B, H G,* and *J C,* paid at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) he the said *H V A,* with the privity and approbation of the said *E T M* (testified by her being a party to and sealing and delivering these presents) HATH granted, bargained, sold, and demised, and by these presents DOTH grant, bargain, sell, and demise unto the said *J B, A B, H G,* and *J C,* their executors, administrators, and assigns, ALL, &c. (the parcels) TOGETHER with all and singular houses, outhouses, edifices, buildings, barns, stables, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said messuages or tenements, hereditaments, and premises belonging or in any wise appertaining to or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any part of them or appurtenant thereunto, with their and every of their appurtenances: TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted, bargained, sold, and demised, or intended so to be, with their and every of their appurtenances, unto the said *J B, A B, H G,* and *J C,* their executors, administrators, and assigns, from thenceforth for and during and unto the full end and term of 99 years in case the said *H V A* and the said *E T M,* his intended wife, shall both so long live, upon the trusts nevertheless, and for the intents and purposes hereinafter declared concerning the same (that is to say) UPON TRUST for the said *H V A* until the said intended marriage shall be solemnized, and from and after the solemnization thereof, UPON TRUST that the said *J B, A B, H G,* and *J C,* and the survivors and survivor of them, and the executors or administrators of such survivor, shall and do, by and out of the rents, issues, and profits of the said premises comprised in the said term of 99 years, from time to time levy and raise the yearly sum of £400 of lawful money of *Great Britain,* clear of all deductions, reprisals, or outgoings whatsoever, for the sole and separate use of the said *E T M,* AS OR FOR PIN MONEY,

demises, &c.

Parcels and general words.

HABENDUM.

To the trustees,

for a term of 99 years in case intended husband and wife should both so long live.

Upon trust after the marriage,

out of the rents, &c. to raise the clear

yearly sum of 400*l.* for wife's separate use for pin money, to be paid quarterly.

and pay the same by equal quarterly payments into the proper hands of the said *E T M* for her separate use, or pay or dispose of the same to such other person or persons and for such uses and purposes as she by any writing or writings under her hand shall, notwithstanding her coverture, from time to time, and without disposing of the same in the way of *anticipation*, order, and direct, TO THE INTENT that the same or any part thereof may not be subject or liable to the debts or engagements, control or interference of the said *H V A*, her intended husband, the first of such payments to be made at the end of three calendar months next after the said intended marriage shall be solemnized: AND ALSO upon trust to permit or suffer the said *H V A*, or his assigns, from time to time to receive and take the residue of the rents, issues, and profits of the premises comprised in the said term for his and their own use: AND it is hereby agreed and declared that the receipt and receipts of the said *E T M*, and also such order and orders in writing under her hand as aforesaid for all such sum or sums of money as shall be paid to her or to such other person or persons as she shall direct or appoint of the said yearly sum of £400, or any part thereof, shall, notwithstanding her coverture, be a good and sufficient discharge and good and sufficient discharges for the same: PROVIDED ALWAYS, and it is hereby agreed and declared by and between the said parties to these presents, that it shall and may be lawful to and for the said *J B*, *A B*, *H G*, and *J C*, or any of them, their or any of their executors, administrators and assigns, in the first place to deduct, retain, and discharge by and out of the rents, issues, and profits of the premises comprised in the said term of 99 years or any of them, all such costs, charges, damages, and expenses as they or any of them shall or may bear, expend, or be put unto, in, or about the execution of the trusts of the said term of 99 years, or in any wise relating thereto, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: AND THIS INDENTURE FURTHER WITNESSETH, that in performance of the said agreement in this behalf, and in consideration of the said intended marriage, and pursuant to and by force and virtue and in exercise and execution of the power or authority to the said *H V A* limited or given by the said will of the said *H W A*, as hereinbefore is mentioned, and of every or any other power or authority whatsoever in any wise enabling him in this behalf, he the said *H V A* by this present deed or writing, sealed and

And to permit husband to receive the residue of the rents for his use.

Agreement that the wife's receipts shall be effectual discharges.

Power to trustees to reimburse themselves all expenses attending the execution of their trusts.

AND pursuant to the power,

delivered by him in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses, attesting the sealing and delivery of these presents by the said *H V A*, DOTH with the privity and approbation of the said *E T M* (testified as aforesaid) grant, limit, and appoint THAT from and immediately after the decease of him the said *H V A* (in case the said intended marriage shall take effect, and the said *E T M* shall happen to survive him) she the said *E T M* and her assigns shall and may have, receive, and take, during the term of the natural life of the said *E T M* as and for a jointure, and in lieu, bar, and satisfaction of dower or thirds and freebench, right, title, claim, or possibility of dower or thirds and freebench which the said *E T M* can or may, or could or might have or demand in or out of all or any of the messuages or tenements, lands, and hereditaments of or to which the said *H V A* shall at any time or times during the said intended coverture be seised or entitled for any estate or interest to which dower thirds or freebench may be incident, one annuity or yearly rent charge of £1000 of lawful money of *Great Britain*, to be issuing out of and charged upon all and every the messuages or tenements, lands, hereditaments, and premises, with the appurtenances hereinbefore particularly described and granted, bargained, sold, and demised, or intended so to be, and to be payable and paid to the said *E T M* or her assigns in the common dining hall of *Lincoln's Inn*, in the county of *Middlesex*, by four equal quarterly payments on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December* in every year, tax free and without any deduction, the first payment thereof to be made on such of the said days of payment as shall next happen after the decease of the said *H V A*; AND ALSO that if the said annuity or yearly rent charge of £1000 hereby limited, or any part thereof, shall at any time or times be in arrear or unpaid by the space of 21 days next after any of the days hereby appointed for the payment thereof as aforesaid, then and so often it shall be lawful to and for the said *E T M* and her assigns, during the term of her natural life to enter into and distrain upon the said messuages or tenements, hereditaments, and premises hereby granted, limited, and appointed, or any part or parts thereof, and to dispose of the distresses then and there found according to law, to the intent that thereby or otherwise the said annual sum or yearly rent charge of £1000 and every part thereof so in arrear and un-

the husband with the privity of the wife, appoints, that immediately after his decease, in case his wife shall survive, she shall receive for a jointure, in bar of dower,

a yearly rent charge of 1000*l.* charged upon the premises comprised in the term,

to be paid quarterly,

without any deduction.

Powers of distress and entry for recovery of rent charge when in arrear.

paid, and all costs, charges, and expenses occasioned by reason of the nonpayment thereof shall be fully paid and satisfied; AND FURTHER, that in case the said annual sum or yearly rent charge of £1000, or any part thereof, shall at any time or times be in arrear or unpaid by the space of 40 days next after any of the days appointed for the payment thereof as aforesaid, then and so often, (although there shall not have been any legal demand made thereof) it shall be lawful to and for the said *E T M* and her assigns during the term of her natural life to enter into and upon and hold the said messuages or tenements, hereditaments, and premises hereby granted, limited, and appointed, or any part or parts thereof, and to receive and take the rents, issues, and profits thereof to her and their own use until she and they shall therewith and thereby or otherwise be fully paid and satisfied the said annual sum or yearly rent charge of £1000 and the arrears thereof due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises, together with all costs, charges, and expenses which she or they shall sustain by reason of the nonpayment thereof, and such possession when taken to be without impeachment of waste: AND THIS INDENTURE FURTHER WITNESSETH that for the considerations aforesaid, and for the more effectually securing the payment of the said annuity or yearly rent charge of £1000 hereby limited unto the said *E T M* and her assigns, and pursuant to and by force and virtue and in further exercise and execution of the power and authority limited and given to the said *H V A* by the said will of the said *H W A*, and of every or any other power or authority enabling him in this behalf, he the said *H V A*, with the privity and approbation of the said *E T M* (testified as aforesaid) doth, by this deed or writing so sealed and delivered by him and so attested as aforesaid, grant, demise, limit, and appoint that in case the said intended marriage shall take effect, and the said *E T M* shall happen to survive him, all and every the said messuages or tenements, lands, hereditaments, and premises hereinbefore particularly described and granted, bargained, sold, and demised, or expressed so to be, with the appurtenances, shall from and immediately after the decease of him the said *H V A* remain and be (subject and without prejudice to the said annual sum or yearly rent charge of £1000 hereinbefore limited to the said *E T M* and her assigns for her life and to the powers and remedies hereinbefore limited or given to her for the recovery thereof when in arrear as aforesaid): TO THE USE of the said

AND for more effectually securing payment of the rent charge, husband in further execution of his power, appoints, that the premises comprised in the term, shall immediately after his decease remain and be

to the use of the trustees,

J B, A B, H G, and *J C,* their executors, administrators, and assigns for and during the full term of 200 years, to be computed from the day of the death of the said *H V A,* UPON THE TRUSTS and for the intents and purposes, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and contained of and concerning the same, that is to say, IN TRUST for better securing to the said *E T M* and her assigns during her life in case she shall survive the said *H V A,* the payment of the said annual sum or yearly rent charge of £1000 hereinbefore limited to her as aforesaid, as the same shall from time to time become due and payable; and for that end and purpose, in case the same annual sum or yearly rent charge or any part thereof shall at any time or times be behind or unpaid by the space of 60 days after any of the said days whereon the same is hereinbefore made payable and ought to be paid as aforesaid, then and so often (although no formal or legal demand shall have been made thereof) it shall and may be lawful to and for the said *J B, A B, H G,* and *J C,* or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, and they and he are and is hereby respectively authorised from time to time to enter into and upon all and every or any part or parts of the said messuages or tenements, lands, hereditaments, and premises so hereby granted, limited, and appointed, and to receive and take the rents, issues, and profits thereof, and by and out of the same rents, issues, profits, or by bringing actions against the tenants or occupiers of the same premises for the recovery of the rents then in arrear, or by making entries upon all or any part of the said premises, or by all or any of the said ways or means or by any other ways and means to levy, raise, and pay all such arrears of the said annual sum or yearly rent charge of £1000 as shall be from time to time so due and unpaid to her the said *E T M* or her assigns, together with all such costs, charges, damages, and expenses as she the said *E T M,* her executors, administrators, and assigns, or the said *J B, A B, H G,* and *J C,* or any of them, their or any of their executors, administrators, or assigns shall or may sustain, expend, or be put unto by reason of the nonpayment thereof, and the recovery or obtaining payment of the same annual sum or yearly rent charge or any part thereof or otherwise in the execution of the said trusts; AND do and shall permit and suffer the person or persons for the time being entitled to the reversion or freehold of the premises comprised in the said term of 200 years, expectant on the determination

for a term of 200 years.

In trust for better securing payment of the rent charge,

with power of distress and entry for recovering payment thereof when in arrear for 60 days,

and to reimburse themselves all costs and expenses,

and to permit the person or persons for the time being entitled to the reversion and

freehold of the premises to receive the surplus rents.

thereof, to receive and take the rents and profits of the same premises, over and above what shall be necessary to be applied for satisfying the trusts hereby declared of the same term:

Proviso for determining the term on the ceasing of the rent charge.

PROVIDED ALWAYS, and it is hereby declared by and between the said parties hereto, that from and after the death of the said *E T M*, and upon full payment of all arrears (if any) of the said yearly rent charge of £1000 hereby limited, and of all costs and expenses occasioned by the nonpayment thereof, the said term of 200 years of and in the said messuages or tenements, lands, hereditaments, and premises comprised therein shall cease, determine, and be void, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding:

Declaration that the receipts of the trustees shall be effectual discharges.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *J B*, *A B*, *H G*, and *J C*, or the survivors or survivor of them, or the heirs, executors, administrators, or assigns respectively of such survivor, for any sum or sums of money payable to them or him under or by virtue of these presents, or in or about the execution of any of the trusts or powers hereinbefore contained, shall be a sufficient and effectual discharge, or sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received; and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or nonapplication, or be in any wise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received:

Power to appoint new trustees.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *H V A*, and *E T M* his intended wife, or the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing to be sealed and delivered by them, him,

or her, in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute, or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates and premises which shall then be vested in the trustee or trustees so dying, desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, limited, appointed, and assured in such sort and manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates and premises respectively (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect, and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates and premises respectively, if there shall be any such continuing trustee or trustees; if not, then by himself or themselves, as fully and effectually, and with all the same power and powers, authority and authorities, giving and signing receipts and effectual indemnifications and discharges, and all powers and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these pre-

sents if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared that the said several trustees hereby nominated and appointed, or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their or any of their giving or signing, or joining in giving or signing any receipt or receipts for the sake of conformity, and any one or more of them shall not be answerable or accountable for the others or other of them, or for the acts, receipts, neglects, or defaults of the others or other of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person with whom or in whose hands any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: AND ALSO that it shall and may be lawful to and for them the said trustees in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, administrators, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in, or about the execution of the aforesaid trusts or in relation thereunto: PROVIDED ALWAYS nevertheless, and it is hereby expressly agreed and declared between and by the said parties to these presents, that the premises hereinbefore granted and demised to the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators and assigns, for the said term of 99 years determinable as aforesaid, and the said annual sum or yearly rent

Clause for the indemnity of the trustees.

Agreement that the premises are granted, &c.

charge of £1000, and the powers and remedies for the recovery thereof hereinbefore granted, limited, and appointed to the said *E T M* and her assigns, and the premises hereinbefore granted, limited, and appointed to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns, during the said term of 200 years, to take effect after the decease of the said *H V A* as aforesaid, are so granted, limited, and appointed, subject and without prejudice to the power of leasing limited and given to the said *H V A* in and by the said will of the said *H W A* as aforesaid, and to every such lease and leases as shall be granted by him of the premises or any part thereof pursuant to such power, it being the true intent and meaning of these presents and of the parties thereto, that it shall and may be lawful for the said *H V A* to exercise such power from time to time as fully, and that every such lease or leases to be made pursuant to the same, shall be as valid and take effect in like manner as if these presents had not been made, any thing hereinbefore contained to the contrary notwithstanding: And the said *H V A*, for himself, his heirs, executors, and administrators, doth hereby covenant, agree, and declare to and with the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, that he the said *H V A* hath not made, done, or committed, or willingly suffered to be done any act, matter, or thing whatsoever, whereby or by reason whereof the premises hereinbefore granted, bargained, sold, and demised, or intended so to be, or any part thereof, are, is, can, shall, or may be impeached, charged, or incumbered in title, estate, or otherwise, or whereby or by reason whereof the power or authority given or limited to him by the said will of his said late father, and intended to be exercised by these presents, now is released, extinguished, suspended, prejudiced, or affected: And also that for and notwithstanding any act, matter, or thing done or suffered by him the said *H V A*, or by the said *H W A* or any of his ancestors, the said *E T M* and her assigns (in case the said intended marriage shall take effect and she shall survive him), shall, and may have, receive, and take the said annual sum or yearly rent charge of £1000, tax free, and have and exercise such powers and remedies for the recovery thereof when in arrear as aforesaid, out of and upon all and every or any of the premises hereby charged or intended to be charged with the same as aforesaid, according to the true intent and meaning of these presents, and all and every the premises hereinbefore granted and demised, limited and appointed unto and

without prejudice to the power of leasing given to the husband and to leases granted by him pursuant to such power.

Covenants by husband that he hath done no act to incumber,

nor whereby the power exercised is released or extinguished.

And that wife shall receive her rent charge, and exercise the powers and remedies for recovery thereof upon the premises charged.

And for quiet enjoyment.

to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns for the said several terms of 99 years and 200 years respectively, shall from time to time remain and be upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, agreements, and declarations hereinbefore expressed or declared of or concerning the same respectively, and be held and enjoyed according to the true intent and meaning of these presents, without any hinderance, interruption, or disturbance whatsoever from or by the said *H V A*, or any person or persons whomsoever lawfully claiming or to claim by, from, or under him, or by, from, or under the said testator *H W A*, or any of his ancestors, (save and except the subsisting leases of the premises): AND FURTHER, that he the said *H V A*, in case the said intended marriage shall take effect, shall and will, at the request of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such other acts, deeds, or assurances for the better and more effectually granting, limiting, settling and appointing unto and to the use of the said *E T M*, or her assigns, such annual sum or yearly rent charge of £1000, with such powers and remedies for the recovery thereof when in arrear as aforesaid, to be issuing out of and charged upon all and every the premises hereinbefore mentioned, and for the better and more effectually granting, limiting, or assuring all and every or any of the premises hereinbefore granted and demised, limited and appointed, or intended so to be unto and to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, for the said several terms of 99 years and 200 years respectively, or either of them, according to the true intent and meaning of these presents as by the said *J B*, *A B*, *H G*, and *J C*, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, or any of them, shall be reasonably devised or advised and required. IN WITNESS, &c.

And for further assurance.

No. X.

A Conveyance to uses to bar Dower, with a Release from a Dowress of her Dower, to which she was entitled as the Widow of her former Husband, with a Covenant on the part of her second Husband, that she will join him in levying a Fine (a).

THIS INDENTURE made the day of , in the year, &c. BETWEEN *J R* of (surviving trustee named in the indenture of release or deed of settlement hereinafter recited) of the first part; *R B* of , and *H A* his wife (the daughter and devisee named in the last will and testament of *J S*, late of , deceased) of the second part; *T R* of , and *A* his wife (which said *A R* before her marriage with the said *T R* was the widow and relict of the said *J S*) of the third part: *W P* of of the fourth part, and *A B* of of the fifth part: WHEREAS the said *J S* deceased, being seised or entitled for an estate of inheritance in fee-simple in possession of or to the messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, duly made, signed and published his last will and testament in writing, bearing date the day of , and thereby (among other things) gave and devised unto his daughter the said *H A B* (then *H A S*, spinster), the said messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, to hold the same from and immediately after his decease, to his said daughter *H A B*, her heirs and assigns for ever; AND WHEREAS the said *J S* departed this life on or about, &c. &c. without having revoked or altered his said will, leaving the said *A R*, then *A S*, his widow and relict; AND WHEREAS by indentures of lease and release, bearing date respectively the days of , the release being made or expressed to be made between the said *R B* and *H A*, his wife, of the first

Parties.

Recites the will of *J S*.

The death of *J S*.

The marriage settlement of *R B* and wife,

(a) Vide Vol. I. p. 529.

part; *O M* of , and *R W* of the second part; and *M B*, (since deceased), and the said *J R* of the third part (being the settlement made in pursuance of certain articles of agreement bearing date the day of then last, and made and executed previously to and in contemplation of the marriage then intended, and which was soon afterwards solemnized between the said *R B* and *H A*, his wife); AND by a fine levied in pursuance of the said indenture of release in his Majesty's court of Common Pleas at *Westminster*, in or as, of term, the said messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, were conveyed and assured (together with other hereditaments) unto and to the use of the said *M B* and *J R*, their heirs and assigns for ever, SUBJECT TO THE DOWER OR THIRDS of the said *A R*, of and in the said hereditaments and premises to which she was entitled as the widow of the said *J S*, and upon the several trusts, and to and for the several ends, intents and purposes therein expressed and declared, and in part hereinafter mentioned (that is to say), UPON TRUST, that they the said *M B* and *J R*, and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, should, when thereunto required in writing by the said *R B* and *H A*, his wife, or the survivor of them; and after the decease of the survivor, then when and as soon as it should appear to the said *M B* and *J R* or the survivor of them, his heirs, executors, administrators or assigns, to be convenient or proper, make sale and dispose of all and every or any part or parts of the aforesaid freehold hereditaments, with the appurtenances, either together or in parcels, and either by public sale, private contract or otherwise, as to them the said trustee or trustees for the time being should seem proper; AND it was agreed and declared, that the receipt or receipts of the said *M B* and *J R*, or the survivor of them, or of the heirs, executors or administrators of such survivor, for any sum or sums of money to arise from any such sale or sales as aforesaid, or which should be paid to them, him or any of them, under or by virtue, or for the purposes of the said indentures now in recital, should from time to time be a good and sufficient discharge, or good and sufficient discharges to the purchaser or purchasers of the said premises or any part thereof, or to such person or persons as should so pay the same, or to his, her or their respective heirs, executors, administrators or assigns; and that the purchaser or purchasers,

and the trusts of the settlement.

or other person or persons paying such sum or sums of money, and taking such receipt or receipts for the same as aforesaid, and his, her, or their respective heirs, executors, administrators or assigns, should not afterwards be answerable or accountable for the loss, misapplication or nonapplication thereof, or of any part thereof, or be in anywise concerned, or obliged to see to the application of the money in such receipt or receipts mentioned and acknowledged to be received or any part thereof, or to inquire into the reason, necessity, propriety or expediency of making any such sale or sales as aforesaid; AND WHEREAS the said *M B* departed this life in or about, &c. &c., AND WHEREAS the said *J R*, as the surviving trustee under the said in part recited indenture of settlement, and in execution of the trusts of the same indenture, hath, at the request of the said *R B* and *H A*, his wife, signified by this present writing, under their hands and seals, contracted and agreed with and to the said *W P* for the absolute sale to him of the said messuage or tenement, and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with the appurtenances and the inheritance thereof in possession, free from all incumbrances (except the land-tax), at or for the price or sum of £ ; AND WHEREAS for enabling the said *J R* to perform the said contract, the said *T R* and *A* his wife, at the request of the said *R B* and *H A* his wife, have agreed to release the said purchased premises from the right of dower or thirds therein of the said *A R*; NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid agreement, and in consideration of the sum of £ of lawful money of *Great Britain*, at or before the sealing and delivery of these presents to the said *J R* in hand, well and truly paid by the said *W P*, at the request and by the desire of the said *R B* and *H A* his wife, and with the privity and approbation of the said *T R* and *A* his wife (testified by their severally being parties to, and sealing and delivering these presents), the receipt and payment of which said sum of £ they the said *J R* and the said *R B* and *H A* his wife, do hereby respectively admit and acknowledge, and of and from the same, and every part thereof, do and each and every of them doth acquit, release and discharge the said *W P*, his heirs, executors, administrators and assigns by these presents, and also in consideration of the sum of 10*s*. a piece of like lawful money to the said *R B* and *H A* and his wife, and *T R* and *A* his wife, in hand, well and truly paid by the said *W P* at or before the sealing and delivery of these presents (the receipt whereof is hereby

The death of one trustee. The contract for the purchase,

and the agreement of dowress to release purchased premises from her dower.

The consideration.

The surviving trustee releases,

acknowledged), he the said *J R*, at the request and by the direction of the said *R B* and *H A* his wife (testified as aforesaid), HATH bargained, sold and released, and by these presents DOTH

and *R B* and wife grant, release, and confirm, and the dowress and her husband release

bargain, sell and release; AND the said *R B* and *H A* his wife, HAVE, and each of them HATH granted, bargained, sold, aliened, released and confirmed, and by these presents DO and each of them DOTH grant, bargain, sell, alien, release and confirm, AND the said *T R* and *A* his wife, at the request and by the direction of the said *R B* and *H A* his wife (testified as aforesaid), HAVE and each of them HATH remised, released and for ever quitted claim, and by these presents DO and each of them DOTH remise, release and for ever quit claim unto the

unto the purchaser.

said *W P* (in his actual possession, now being by virtue of a bargain and sale to him thereof made by the said *J R*, *R B* and *H A* his wife, for 5*s*. a piece consideration, by indenture

(reference to lease for a year.)

bearing date the day next before the day of the date of these presents for the term of one whole year, commencing from the day next before the day of the date of the indenture of bargain and sale, and by force of the statute made for transferring uses

The parcels and general words,

into possession), and to his heirs, ALL, &c. (parcels), together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, furzes, quarries, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said messuage or tenement, hereditaments and premises belonging, or in anywise appertaining, or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them, or any of them, or appurtenant thereunto, with their and every

and all deeds, &c.

of their appurtenances; and all deeds, evidences and writings relating to or concerning the said messuage or tenement, hereditaments and premises, or any of them solely or together, with other hereditaments of less value, now in the custody or power of the said *J R*, *R B* and *H A* his wife, or any or either of them, or which he, she or they can obtain or procure without suit at law or in equity, together with true and attested copies of all deeds, evidences and writings relating to or concerning the said messuage or tenement, hereditaments and premises,

or any of them jointly, with other hereditaments of equal or greater value, the first set of copies to be delivered at the costs and charges of the said *J R*, *R B* and *H A* his wife, some or one of them, but all future copies to be made, written and taken at the request, costs and charges of the said *W P*, his heirs, appointees or assigns, AND the reversion and reversions, remainder and remainders yearly and other rents, issues and profits of all and singular the said messuage or tenement, hereditaments and premises hereby released or expressed and intended so to be; AND all the estate, right, title, interest, inheritance, reversion, use, trust, possession, property, claim and demand whatsoever, both at law and in equity, of them the said *J R*, *R B* and *H A* his wife, or any or either of them, of, in and to the same premises or any of them, and every part and parcel thereof, TO HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereby released or expressed and intended so to be, with their appurtenances (freed and discharged of and from all right of dower or thirds to which the said *A R* is anywise entitled therein or in any part thereof) unto the said *W P*, his heirs and assigns, to the uses upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter mentioned, expressed and contained of and concerning the same; AND in pursuance and further performance of the said agreement, and for the considerations aforesaid, and for the more effectually conveying and assuring the said messuage or tenement and hereditaments hereinbefore released or expressed and intended so to be, with their appurtenances (freed and discharged from the dower or thirds of the said *A R*), to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter expressed, declared and contained of or concerning the same, he the said *T R* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said *W P* and his heirs, that they the said *T R* and *A* his wife, shall and will at the costs and charges of the said *J R*, *R B* and *H A* his wife, his heirs, executors, administrators or assigns, or some or one of them, as of *Hilary* Term last, or before the end of *Easter* Term next ensuing, acknowledge and levy before his Majesty's justices of the court of Common Pleas at *Westminster*, unto the said *W P* and his heirs, a fine *sur conuzance de droit come ceo*, &c. whereupon proclamations shall be had and made

and the reversion, &c.

and all the estate, &c.

HABENDUM

(discharged from dower)

to the purchaser, to the uses aftermentioned.

Covenant by the husband of dowress, that she shall join him in levying a fine.

according to the statute in that case made and provided, and the usual course, order and manner of fines for assurances of lands in like cases used and accustomed, of all the said hereditaments and premises hereinbefore released or expressed and intended so to be, with their appurtenances, by such names, quantities, qualities and descriptions as shall be sufficient to ascertain and comprize the same; and it is hereby agreed and declared between and by the parties to these presents, that the grant, releases and confirmation hereinbefore contained and hereby made as aforesaid, and the said fine so as aforesaid, or in any other manner, or at any other time to be acknowledged and levied by the said *T R* and *A* his wife, shall operate, and enure, and be adjudged, deemed, construed and taken to operate and enure TO SUCH USES, upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *W P* shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct, limit or appoint, and for default of and until such direction, limitation or appointment, and so far as no such direction, limitation or appointment shall extend, TO THE USE of the said *W P* and his assigns during his life without impeachment of waste; and after the determination of that estate by forfeiture or otherwise in his lifetime, TO THE USE of the said *A B* and his heirs during the life of the said *W P*, IN TRUST for him the said *W P* and his assigns during his life, and to prevent any wife of the said *W P* from being entitled to her dower out of or in the premises or any part thereof; and after the determination of the estate so limited, in use to the said *A B* and his heirs during the life of the said *W P* as aforesaid, TO THE USE of the said *W P*, his heirs and assigns for ever (*a*); AND the said *T R* doth for himself, his heirs, executors and administrators, covenant and declare with and to the said *W P*, his heirs, appointees and assigns by these presents, that they the said *T R* and *A* his wife, have not, nor hath either of them at any time heretofore made, done, committed or executed, or knowingly or willingly permitted, or suffered, or been party or privy to any act, matter or thing whatsoever, whereby or by reason or means

Declaration that the grant, releases and confirmation, and the said fine and all other fines by the same parties, shall enure to such *uses* as the purchaser shall by deed, &c. appoint,

and for default of appointment, to the *use* of the purchaser for life, without impeachment of waste; remainder to the *use* of a trustee and his heirs during the life of the purchaser in *trust* for him for life, with remainder to the *use* of the purchaser in fee.

Covenant by the husband of the dowress, that they had done no act to prevent them from releasing the premises as aforesaid.

(*a*) See Vol. I. p. 529.

thereof they are in anywise prevented from releasing the said messuage or tenement, hereditaments and premises hereinbefore released or expressed and intended so to be in manner aforesaid, according to the true intent and meaning of these presents; AND the said *J R* doth for himself, his heirs, executors and administrators, covenant and declare, with and to the said *W P*, his heirs, appointees and assigns by these presents, that he the said *J R* hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to, any act, deed, matter or thing whatsoever whereby or by reason or means whereof the said messuage or tenement, hereditaments and premises hereby released or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall or may be impeached, charged, affected or incumbered in title, estate, or otherwise howsoever; AND the said *R B* for himself, his heirs, executors and administrators doth covenant, promise and agree with and to the said *W P*, his heirs, appointees and assigns by these presents in manner following (that is to say), that for and notwithstanding any act, deed, matter or thing by him the said *R B* and *H A* his wife, or the said *J S* the testator, made, done, committed or executed, or knowingly or willingly suffered to the contrary, they the said *R B* and *H A* his wife, and *J R*, some or one of them, now have or hath in themselves, herself or himself, good right, full power, and lawful and absolute authority to grant, bargain, sell, release and convey the said messuage or tenements, and other hereditaments hereinbefore released or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *W P* and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; AND THAT the said messuage or tenement, and other hereditaments hereinbefore released or expressed and intended so to be, with their appurtenances, shall and may from time to time, and at all times hereafter, go and remain TO THE USES hereinbefore limited, expressed and declared, and be peaceably and quietly entered into and upon, and be held, occupied, possessed and enjoyed, and the rents, issues and profits thereof, and of every part thereof, had, received and taken accordingly without the lawful let, suit, trouble, interruption, claim or demand whatsoever of or by him the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim by, from or

Covenant by trustee, that he had done no act to incumber.

Covenants for the title by *R B*,

that he and wife, and the said *J R* some or one of them,

had good right to convey,

for quiet enjoyment,

free from incumbrances,

under, or in trust for them or any of them; or by, from, or under the said *J S* the testator; and that free and clear, freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said *R B*, his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from and against all, and all manner of former and other gifts, grants, bargains, sales, jointures, dower, right and title of dower, uses, trusts, entails, wills, statutes merchant or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sum and sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of, from and against all other estates, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed or occasioned, or suffered by the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or of or by any person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them or any of them, or the said *J S* the testator, or

and for further assurance.

any person or persons lawfully or equitably claiming or to claim under him; AND FURTHER, that they the said *R B* and *H A* his wife, and their heirs, and all and every other person and persons whomsoever having or claiming, or who shall or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever either at law or in equity, of, in, to or out of the said messuage or tenement, and other hereditaments hereinbefore released or expressed and intended so to be, or any of them or any part thereof, by, from, under, or in trust for them the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or by, from, or under the said *J S* the testator, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said *W P*, his heirs, appointees or assigns, make, do, acknowledge, levy, suffer and execute, or cause and procure to be made, done, acknowledged, levied, suffered and executed all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring of the said messuage or tenement, and other hereditaments hereinbefore released or expressed, and intended so to

be, and every part thereof, with their appurtenances, TO THE USES hereinbefore limited, expressed or declared, as by the said *W P*, his heirs, appointees or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c.

No. XI.

Assignment of an outstanding Term in trust for a purchaser to attend the Inheritance (*a*).

Parties.

THIS INDENTURE made, &c. Between *A B* of (administrator of the goods and chattels, rights and credits, of *A O*, late of deceased) of the first part, *C D* of and *S* his wife, (who before her marriage with the said *C D* was the widow and relict of *R B*, late of deceased) of the second part, *E F* of of the third part, and *G H* of of the fourth part: WHEREAS (*b*) by indentures of lease and release bearing date respectively on or about the and days of the release being made, or expressed to be made between *E H* of the first part, *B G* of the second part, and *S W* of the third part; and by a common recovery suffered in pursuance of the same indenture of release in his Majesty's Court of *Common Pleas* at *Westminster*, in *Michaelmas* Term, in the year : ALL THAT messuage, &c. (the parcels) with their appurtenances, were for the considerations in the said indenture of release mentioned, limited, and assured, to the use of the said *S W*, his executors, administrators, and assigns, from the day before the day of the date of the said indenture of release for the term of 1000 years without impeachment of waste, with remainder to the use of the said *E H*, his heirs and assigns for ever, and in the said indenture of release was contained a proviso or condition for making void the said term of 1000 years on payment by the said *E H*, his heirs, executors, administrators, or assigns, unto the said *S W*, his executors, administrators, or assigns, of the sum of £60, with interest for the same, after the rate, on or at the days or times, and in the manner therein mentioned and appointed for payment thereof respectively: AND WHEREAS by indentures of lease and release bearing date respectively on

Recites the deed creating the term.

The deed conveying the fee to *J O* in trust for whom the term is assigned by the following deed.

(*a*) Vide Vol. I. p. 532.

(*b*) As to the propriety of the recitals contained in this precedent, see *Sugd.* on Vend. and Purch. 356.

or about the and days of the release being made, or expressed to be made between the said *E H*, and *Elizabeth* his wife, of the first part, and *J O* of the other part, and by a fine *sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *E H*, and *Elizabeth* his wife, before the justices of the said Court of *Common Pleas* at *Westminster*, in pursuance of a covenant in that behalf in the same indenture of release contained, the reversion, freehold and inheritance of and in the said messuage or tenement, pieces or parcels of land, and other hereditaments comprised in the said term of 1000 years, with their appurtenances, was conveyed and assured unto and to the use of the said *J O*, his heirs and assigns for ever: AND WHEREAS under and by virtue of certain *mesne* assignments and acts in the law, and ultimately by an indenture of assignment bearing date the day of and made, or expressed to be made, between *E W* of the first part, the said *E H* of the second part, the said *J O* of the third part, and the said *A O* of the fourth part; the said messuage or tenement, pieces or parcels of land, and other hereditaments, with the appurtenances, became vested in the said *A O* for all the residue of the said term of 1000 years, in trust nevertheless for the said *J O*, his heirs and assigns, and such other person or persons to whom the freehold and inheritance of the said premises should belong, and to protect the same from all *mesne* incumbrances, if any such there were: AND WHEREAS the said *J O* duly made and published his last will and testament in writing, bearing date on or about the day of and thereby gave and devised (among other hereditaments) the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, by the description of all that his messuage, &c. (the description from the will) unto his wife *M O*, and her assigns for her life, and after her decease unto his daughter *H G*, the wife of *R G* (then *H O*), and to her heirs and assigns for ever: AND WHEREAS the said *J O* departed this life shortly after the making of his said will, without having in any manner revoked or altered the same: AND WHEREAS the said *M O* departed this life on or about the day of : AND WHEREAS by indentures of lease and release, bearing date respectively on or about the day of the release being made, or expressed to be made, between the said *R G*, and *H* his wife, of the one part, and the said *R B* of the other part; AND by

The deed assigning the term to *A O* in trust to attend the inheritance of *J O*.

The will of *J O* devising the fee to *H G*.

The death of *J O*.

The death of *M O*.

A conveyance of the fee to *R B*.

a *fine sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *R G*, and *H* his wife, before the justices of the said Court of *Common Pleas*, at *Westminster*, in or as of *Trinity* Term, in the said year the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with their appurtenances, were for the considerations in the said indenture of release now in recital expressed, conveyed, and assured by the said *R G*, and *H* his wife, unto and to the use of the said *R B*, his heirs and assigns for ever: AND WHEREAS the said *R B* duly made and published his last will and testament in writing, bearing date on or about the day of and thereby devised all his real estate to his wife, the said *S D* (then *S B*) and her assigns for her life, without impeachment of waste, with remainder to all his the said testator's children of that marriage in tail, with cross remainders in tail, between or among them, if more than one, with remainder to his niece *M*, the wife of *R S*, of, &c. her heirs and assigns for ever: AND WHEREAS, the said *R B* departed this life in the month of without having in any manner revoked or altered his said will: AND WHEREAS by indentures of lease and release, bearing date respectively on or about the day of 1800, the release being made, or expressed to be made, between the said *C D*, and *S* his wife, of the first part, the said *R S*, and *M* his wife, of the second part, and *W S* of the third part; and by a *fine sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *C D*, and *S* his wife, and the said *R S*, and *M* his wife, before the justices of the said Court of *Common Pleas* at *Westminster*, in or as of *Easter* Term in the said year 1800, the said messuage or tenement, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, were for the considerations in the said indenture of release now in recital expressed, conveyed, and assured by the said *C D*, and *S* his wife, and *R S*, and *M* his wife, to the use of such person or persons for such estate and estates, interest and interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such power of revocation and new appointment, and other powers, provisoes, limitations, declarations, and agreements, as the said *C D*, and *S* his wife, at any time or times thereafter by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in

The will of *R B.*

The death of *R B.*

A conveyance by the devisees of *R B.*

the presence of and attested by two or more credible witnesses, should direct, limit, or appoint, and in default of and until such direction, limitation, or appointment to the use of the said *W S*, his heirs and assigns, in trust for the said *C D*, and *S* his wife, and their heirs and assigns for ever: AND WHEREAS by an indenture of lease and an indenture of appointment and release, the lease bearing date the day next before the day of the date of the appointment and release, and the appointment and release bearing even date with these presents, and made, or expressed to be made, between the said *C D*, and *S* his wife, of the first part, the said *W S* of the second part, the said *E F* of the third part, and *B A* of the fourth part; it is witnessed that in consideration of the sum of £ to the said *C D*, and *S* his wife, paid by the said *E F*, the said *C D*, and *S* his wife, in exercise and execution of the power or authority given or limited to them as hereinbefore is mentioned, and of every or any other power or authority enabling them in that behalf, did direct, limit, and appoint that the messuage or tenement, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, should henceforth go, remain, and be to the uses and upon and for the trusts, intents, and purposes, and under and subject to the power of appointment hereinafter limited, expressed, or declared of or concerning the same: And by the said indenture of appointment and release now in recital it is further witnessed, that for the considerations therein and hereinbefore mentioned, and for a nominal consideration, the said *W S*, at the request and by the direction of the said *C D*, and *S* his wife (testified as therein mentioned), did bargain, sell, and release, and the said *C D*, and *S* his wife, did grant, release, and confirm unto the said *E F*, and his heirs (amongst other hereditaments), the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, to hold the same unto the said *E F*, and his heirs, to the uses, upon and for the trusts, intents, and purposes, and under and subject to the power of appointment thereinafter limited, expressed, and declared, of or concerning the same; and by the indenture of appointment and release now in recital it was agreed and declared that the direction, limitation, and appointment, and grant, releases, and confirmation thereinbefore contained, and thereby respectively made as aforesaid, should respectively operate and enure, to such uses, upon such trusts,

The conveyance of the fee of even date to the purchaser.

and to and for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as the said *E F* should by any deed or deeds, writing or writings, with or without power of revocation, and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct, limit, or appoint, and for default of and until such direction, limitation, or appointment, to the use of the said *B A*, and his heirs, during the life of him the said *E F*, in trust for him the said *E F*, and his assigns, during his life, with remainder to the use of the said *E F*, his heirs and assigns for ever: AND WHEREAS the said *A O* departed this life on or about the day of intestate, and administration of his goods and chattels, rights, and credits, was granted by the Prerogative Court of the Archbishop of *Canterbury* to the said *A B*, on or about the day of now last past: AND WHEREAS on the treaty for the purchase by the said *E F* it was agreed, that the said hereditaments comprised in the said term of 1000 years should be assigned to the said *G H*, his executors, administrators and assigns, for all the residue of the same term, upon the trusts hereinafter declared of or concerning the same: NOW THIS INDENTURE WITNESSETH that in consideration of the premises, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain* to the said *A B* paid by the said *G H* at or before the sealing and delivery of these presents (the receipt of which is hereby acknowledged) he the said *A B*, at the request and by the direction of the said *C D*, and *S* his wife, and upon the nomination and appointment of the said *E F* (testified by their severally being parties to and sealing and delivering these presents), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, &c. unto the said *G H*, his executors, administrators, and assigns, ALL AND SINGULAR the said messuage or tenement, pieces or parcels of land, hereditaments and premises, by the said in part recited indenture of the day of assigned to the said *A O*, his executors, administrators, and assigns for the residue then to come of the said term of 1000 years, as hereinbefore is mentioned, with their appurtenances; AND all the estate, right, title, interest, term and terms for years, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said *A B*, of, in, to, from, out of, and upon the same premises, and every of them, and every part or parcel thereof; TO HAVE

The death of *A O* intestate, and the administration to *A B*.

The agreement as to the assignment of the term.

The assignment of the term.

HABENDUM.

AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereby assigned, or expressed and intended so to be, with their appurtenances, unto the said *G H*, his executors, administrators, and assigns, for and during all the residue and remainder now to come and unexpired of the said term of 1000 years, IN TRUST nevertheless for the said *E F*, his heirs, appointees, and assigns, and to assign and dispose of the same from time to time, as he or they shall direct or appoint, and in the mean time upon trust to permit the residue and remainder of the said term of 1000 years to wait upon and attend the reversion, freehold, and inheritance of the same premises so as to be subservient thereunto, and to protect the same from all *mesne* incumbrances (if any such there be): AND the said *A B* doth for himself, his heirs, executors, and administrators, covenant and declare with and to the said *G H*, his executors, administrators, and assigns, by these presents, that he the said *A B* hath not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS, &c.

The trusts of the term.

Covenant by the said *A B* that he had done nothing to incumber, &c

No. XII.

A Settlement of the Wife's Property, with a limitation to the Husband until his Bankruptcy or Insolvency, &c. (*a*).

Parties.

THIS INDENTURE made, &c. BETWEEN *A B* of merchant, of the first part, *C D* of spinster, of the second part, and *E F* of and *G H* of of the third part: WHEREAS

Recites the wife's title to money, due on a policy of assurance and to *London Dock* shares.

the said *C D*, as sole executrix and residuary legatee named in the last will and testament of *T D* of (her late father deceased) is possessed of or entitled to the sum of £1000, payable on the day of next by the *Equitable Assurance* Office, upon a policy of assurance on the life of the said *T D*: AND the said *C D*, as such executrix and residuary legatee as aforesaid, is also entitled to the sum of £2500 *London Dock* Stock shares: AND WHEREAS a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said *A B* and *C D*: AND WHEREAS upon the treaty for the said intended marriage it was agreed, that the said sum of £1000 payable upon the aforesaid policy of assurance, and also the said sum of £2500 *London Dock* Stock shares should respectively be assigned and transferred to the said *E F* and *G H*, their executors, administrators, and assigns, upon the trusts, and for the intents and purposes, and with, under, and subject to, the powers, provisoes, agreements, and declarations hereinafter mentioned, expressed, and declared of or concerning the same: AND WHEREAS, in pursuance and part performance of the said agreement, she the said *C D*, with the privity and approbation of the said *A B* (testified by his being a party to and sealing and delivering these presents), HATH transferred or caused to be transferred, in the books kept for that purpose by the *London Dock Company*, into the names of the said *E F* and *G H* the said sum of £2500 in the joint stock of the said company, to be held by them upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations

The intended marriage.

The agreement to settle the property,

and the transfer of the shares into the names of the trustees.

(*a*) Vide *supra*, p. 87.

hereinafter expressed and declared, or referred to, of, or concerning the same: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the aforesaid agreement, and in consideration of the said intended marriage, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain* to the said *C D* in hand, well and truly paid by the said *E F* and *G H*, at or immediately before the sealing and delivering of these presents (the receipt whereof is hereby acknowledged), she the said *C D*, with the privity and approbation of the said *A B* (testified as aforesaid), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F* and *G H*, their executors, administrators, and assigns, ALL THAT the said sum of £1000 so payable by the *Equitable Assurance* Office as hereinbefore is mentioned, together with the said policy of assurance and the full benefit thereof, AND all and every other sums and sum of money to be had or received thereby, AND all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of her the said *C D* in and to the same premises and every part thereof, TOGETHER with full power and authority to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for the same, and every part thereof respectively, in the name of her the said *C D*: TO HAVE, HOLD, RECEIVE, AND TAKE the said sum of £1000, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said *E F* and *G H*, their executors, administrators, and assigns, upon the trusts nevertheless, and for the intents and purposes, and with, under, and subject to, the powers, provisoes, agreements, and declarations hereinafter expressed and declared of and concerning the same: AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators, and assigns, shall stand and be possessed of, and interested in, the said sum of £1000, and all and every other sums or sum of money due or payable upon the aforesaid policy of assurance, and also of and in the said sum of £2500 *London Dock* Stock shares, and the dividends, interest, and produce thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to, the powers, provisoes, agreements, and declarations hereinafter expressed or declared of or concerning the same respectively (that is to say), IN TRUST for the said *C D*, her executors, administrators, and

ASSIGNMENT

of the money due on the policy.

HABENDUM

to the trustees,

upon trust to receive the money due

upon the policy,

assigns, in the mean time and until the solemnization of the said marriage, and from and after the solemnization thereof, upon trust that they the said *E F* and *G H*, and the survivor of them, his executors, administrators, and assigns, do and shall call in and receive the said sum of £1000 when and so soon as the same shall become payable; and also all and every other sums or sum of money which shall or may be or become due or payable under or by virtue of the said policy of assurance, AND do and shall lay out and invest the same in their or his names or name in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall from time to time (with the consent in writing of the said *A B* and *C D*, his intended wife, during their joint lives, and after the decease of either of them, with the consent in writing of the survivor of them during his or her life, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being) alter, vary, and transpose the said stocks, funds, and securities as to them or him shall seem expedient, AND do and shall either permit and suffer the said sum of £2500 *London Dock* Stock shares, to remain in its actual state of investment, or do and shall at any time or times (with such consent or at such discretion as aforesaid) sell, transfer, or dispose of the same, or any part or parts thereof, for such price or prices as they or he shall think fit, AND do and shall (with such consent or at such discretion as aforesaid) lay out or invest the money to arise by or from such sale, transfer, or disposition, in their or his names or name in the purchase of a competent share or competent shares of any of the parliamentary stocks or funds of *Great Britain*, or at interest upon government or real securities in *England*; AND do and shall from time to time (with such consent or at such discretion as aforesaid) alter, vary, and transpose the same stocks, funds, and securities as to them or him shall seem meet; AND do and shall stand and be possessed of and interested in all and singular the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof respectively, upon and for the trusts, intents, and purposes, and with, under, and subject to, the powers, provisoes, agreements, and declarations hereinafter expressed and declared of and concerning the same (that is to say), UPON TRUST that they the said *E F* and *G H*, and the survivor of them, and the executors,

and to invest the same upon government or real securities.

Power to vary securities (with consent of husband and wife)

and to permit the shares to remain as invested, or (with consent of husband and wife) to sell them and to invest produce upon government or real securities,

with power to vary securities.

And upon trust

administrators, and assigns of such survivor, do and shall from time to time pay the interest, dividends, and annual produce of all and singular the said trust monies, stocks, funds, and securities to, or permit the same to be received by, the said *A B*, and his assigns, for and during the term of his natural life, or until he the said *A B* shall be found and declared a bankrupt, or shall become insolvent, or make and enter into any composition with his creditors, or shall take or accept the benefit of any act of parliament made or to be made for the relief of insolvent debtors: AND from and after the determination of the aforesaid trust hereinbefore declared for the benefit of the said *A B*, in case the same shall happen during the joint lives of the said *A B*, and *C D* his intended wife, do and shall pay and apply the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities to such person or persons and for such intents and purposes as the said *C D* shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but not so as to dispose of or affect the same in the way of *anticipation*) direct or appoint; AND in default of such direction or appointment into her own hands for her sole and separate use and benefit, independently and exclusively of the said *A B*, her intended husband, and without being in any wise subject to his debts, control, interference, or engagements, and the receipts of the said *C D*, or of her appointees, notwithstanding her coverture, to be from time to time sufficient discharges for the same; AND from and after the decease of the said *A B* (whether the aforesaid trust for his benefit shall have determined in his lifetime or not) do and shall during the life of the said *C D* pay the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities to, or permit the same to be received by, her the said *C D* for her sole and separate use and benefit, exclusively of any future husband, and without being in any wise subject to his debts, control, or engagements; AND from and after the determination of the trust hereinbefore declared for the benefit of the said *A B* as aforesaid (whether the same shall happen in his lifetime or not), and the decease of the said *C D*, do and shall stand and be possessed of and interested in all and singular the said trust monies, funds, stocks, and securities, and all the interest, dividends, and annual produce thereof respectively, IN TRUST for all and every or such one or more exclusively of the other or others of the children or child of the said *A B* by

to pay the interest and produce of all the trust monies, &c.

to husband for life, or until his bankruptcy or insolvency,

and then, in case the same shall happen during the joint lives of husband and wife, to such persons as wife, by writing under her hand, shall appoint.

And in default of appointment, into her own hands for her separate use, and her receipts to be sufficient discharges.

And after the death of husband,

to the wife for her separate use.

And after determination of trust for husband's benefit and wife's decease,

in trust for such of their children as

husband and wife shall by deed jointly appoint.

the said *C D*, his intended wife, with such provisions for their respective maintenance and education, and advancement at such age, day, or time, or respective ages, days, or times, and (if more than one) in such shares and proportions, and with such annual sums of money and limitations over for the benefit of the said children, or some or one of them, and upon such conditions and in such manner as the said *A B* and *C D* shall, during their joint lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation or new appointment, to be by them both sealed and delivered in the presence of and attested by two or more credible witnesses, direct or appoint, and in default of such joint direction or appointment, and so far as such joint direction or appointment shall not extend, then as the survivor of them the said *A B* and *C D* shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him or her sealed and delivered in the presence of and attested by two or more credible witnesses, or by his or her last will and testament in writing, or by any codicil or codicils thereto, to be by him or her signed and published in the presence of and attested by a like number of credible witnesses, from time to time direct or appoint: AND in default of such direction or appointment, and so far as no such direction or appointment shall extend, IN TRUST for all and every the children and child of the said *A B* by the said *C D*, who being a son or sons shall attain the age of 21 years (*a*), or being a daughter or daughters shall attain that age or marry, to be divided between or among them, if more than one, in equal shares and proportions, and if there shall be but one such child, the whole to be in trust for that one child: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents (that in default of any such direction or appointment as aforesaid to the contrary), no child or children, taking any part of the said trust monies, stocks, funds, or securities under or by virtue of any direction or appointment to be made by the said *A B* and *C D*, or the

And in default of joint appointment, then as the survivor shall by deed or will appoint.

And in default of such appointment, in trust for all the children equally. Sons' shares payable at 21, and daughters' at that age or marriage; and if only one child, the whole for that one child. Children partially advanced to bring their shares into *hotchpot*.

(*a*) If it should be intended to provide for the issue of sons dying under 21, then the trusts should be in the following form: "In trust for all and every the children and child of the said *A B* by the said *C D*, who being a son or sons shall attain the age of 21 years, or die under that age, leaving issue living at his or their decease or respective deceases, or born in due time after, or being a daughter," &c.

survivor of them, in pursuance of the powers or authorities hereinbefore in that behalf contained, or either of them, shall have or be entitled to any further or other share of and in that part of the same trust-monies, stocks, funds, or securities, of which no such direction or appointment shall have been made as aforesaid, without bringing his, her, or their appointed share or shares into hotchpot, and accounting for the same accordingly: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times after the decease of the survivor of them, the said *A B* and *C D*, or in the lifetime of them, or of the survivor of them, in case they, he, or she shall so direct by any writing or writings under their, his, or her hands or hand, to levy and raise any part or parts of the then expectant or then vested portion or portions of any child or children of the said intended marriage, under the trusts hereinbefore declared, not exceeding in the whole for any one such child one moiety or equal half part or share of his or her then expectant or then vested portion, and to pay and apply the same for his, her, or their preferment, advancement, or benefit, in such manner as the said *E F* and *G H*, or the survivor of them, or the executors, administrators, or assigns of such survivor shall in their or his discretion think fit: AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns, of such survivor, do and shall, after the determination of the aforesaid trust for the benefit of the said *A B*, and the decease of the said *C D*, pay and apply the whole or such part as they the said *E F* and *G H*, or the survivor of them, or the executors, administrators, and assigns of such survivor shall think fit, of the interest, dividends, and annual produce of the portion or respective portions to which any child or children of the said intended marriage shall or may for the time being be entitled in expectancy under the trusts hereinbefore declared, for or towards the maintenance and education of such child or children respectively, in the mean time and until such, his, her, or their portion or portions shall become payable; AND do and shall, during such suspense of absolute vesting as aforesaid, accumulate all the residue thereof (if any) in the way of compound interest, by investing the same, and all the resulting income

Power to trustees to raise parts of childrens' expectant portions for their advancements.

And after determination of trust for husband's benefit and wife's decease, to pay the interest of childrens' portions for maintenance.

And to invest residue of interest, and all resulting produce of trust-

monies for the purpose of accumulation.

and produce thereof from time to time in or upon any such stocks, funds, or securities as are hereinbefore mentioned, for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents that if there shall be no child of the said intended marriage, who being a son shall attain the age of 21 years, or being a daughter shall attain that age or marry, then and in such case the said *E F* and *G H*, and the survivor of them, and the executors, administrators, or assigns of such survivor, shall from and after the determination of the aforesaid trust for the benefit of the said *A B*, and the decease of the said *C D*, and such default or failure of children of the said intended marriage as aforesaid, stand and be possessed of, and interested in, all and singular the said trust-monies, stocks, funds, and securities, or such part or parts thereof as shall not have been vested or been applied under any of the trusts, powers, or authorities hereinbefore declared or contained, upon the trusts hereinafter declared of or concerning the same (that is to say), if the said *C D* shall survive the said *A B*, IN TRUST for her the said *C D*, her executors, administrators, and assigns, but if the said *C D* shall die in the lifetime of the said *A B*, then in trust for such person or persons and for such intents and purposes as the said *C D*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of or purporting to be a will or codicil, direct or appoint; and in default of such direction or appointment, and so far as no such direction or appointment shall extend, in trust for the person or persons, who, under the statute for the distribution of the effects of intestates, would upon the decease of the said *C D* become entitled to her personal estate if she the said *C D* had died without having married and intestate, and such persons, if more than one, to take in the shares in which they would have become entitled to such personal estate after the determination of the aforesaid trust, for the benefit of the said *A B*, on the decease of the said *C D*: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, or the survivor of them, or the executors, administrators, and assigns of such survivor, at any times or time during the lives

If no child, to attain a vested interest,

and if wife survive, then to her absolutely, but if husband survive, then in trust for such persons as wife shall by will appoint, and in default of appointment, in trust for her next of kin.

Power for trustees, with consent of husband and wife, to lay out trust-monies in the purchase of lands, &c.

or life of the said *A B* and *C D*, or the survivor of them, with their, his, or her consent and approbation in writing, to lay out and invest the said trust-monies, or any part or parts thereof or the money to arise or be produced by the sale, transfer, or disposition of any stocks, funds, or securities in or upon which the said trust-monies, or any part or parts thereof, shall or may be laid out or invested in the purchase of freehold or copyhold manors, messuages, lands, tenements, or hereditaments in *England*, for an estate of inheritance, or any leasehold lands, messuages, or tenements in *England*, for any term of years (whereof not less than 60 years shall be to come and unexpired at the time of such purchase) to be conveyed, surrendered, or assigned to them the said *E F* and *G H*, or the survivor of them, their or his heirs, executors, administrators, or assigns, according to the nature of the estate or interest therein, UPON TRUST nevertheless (by and with the consent and approbation of the said *A B* and *C D*, or the survivor of them, to be signified by writing under their, his, or her hands or hand during the lifetime of them, or the survivor of them, and after the decease of the survivor of them, at the discretion and of the proper authority of the said *E F* and *G H*, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor), to sell and dispose of the said manors, messuages, lands, tenements, or hereditaments, which shall have been so purchased as aforesaid, either by public sale or private contract, and in such manner as shall be deemed most convenient, and at the best price or prices that can be at the time of such sale reasonably had or gotten for the same, unto such person or persons who shall be willing to become the purchaser or purchasers thereof respectively; and upon trust to apply the money arising by such sale (after payment of the costs, charges, and expenses attending the same), upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, agreements, and declarations (including the said powers of purchasing freehold, copyhold, and leasehold estates) as the money so raised and laid out in the purchase of such manors, messuages, lands, tenements, and hereditaments, was subject to before such purchase was made, or would have been subject to if the same had not been laid out therein; and also in trust in the mean time and until such manors, messuages, lands, tenements, or hereditaments shall be so sold, to apply the rents and profits thereof in such manner as the interest, dividends, and

annual produce of the money laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared, in case such purchase had not been made; it being hereby agreed and declared that the said manors, messuages, lands, tenements, or hereditaments so to be purchased by the trustees or the survivor of them, his heirs, executors, administrators, or assigns, under this present power as aforesaid, shall, when so purchased, be considered as money, and be subject to such and the same trusts in all respects as the money laid out in the purchase thereof was subject to before such purchase was made, or would have been subject to if the same had not been laid out: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F* and *G H*, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, for any sum or sums of money payable to them or him, under or by virtue of these presents, or in or about the execution of any of the trusts or powers hereinbefore contained, shall be sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed, or acknowledged to be received, and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not be afterwards answerable or accountable for any loss, misapplication, or nonapplication, or be in any wise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees, in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or any of them, as hereinafter is mentioned, shall happen to die, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged, then and in such case and when and so often as the same shall happen, it shall and may be lawful to and for the said *A B* and *C D*, his intended wife, or the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by them, him, or her in the presence of and attested by two or more credible witnesses, from time to time to no-

Declaration that the receipts of the trustees shall be effectual discharges.

Power to appoint new trustees.

minate, substitute, or appoint any other person or persons to be trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, monies, and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, conveyed, assigned, and transferred in such sort and manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, monies, and premises, then in such new trustees only, upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies, and premises respectively (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect, and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, if there shall be any such continuing trustee or trustees, or if not then by himself or themselves, as fully and effectually, and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out, and investing, giving and signing receipts and effectual indemnifications and discharges to purchasers, mortgagees, or others, and all other powers and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to

do, or could or might have done, under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person with whom, or in whose hands, any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks or funds, in or upon which the said trust monies or any part thereof shall be placed out or invested, nor for any other misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively; and also that it shall and may be lawful to and for them the said trustees in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees all costs, charges, damages, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto. IN WITNESS, &c.

Clause to indemnify the trustees.

No. XIII.

Surrender of a Lease for Lives by a married Woman, without a Fine under the Statute 29 Geo. II. *c.* 31 (*a*).

TO ALL TO WHOM THESE PRESENTS SHALL COME,

A B of and *C* his wife (before her marriage *C D*, spinster), send greeting: WHEREAS the Warden and Scholars of by an indenture of lease under their common seal, bearing date the day of did grant, demise, and lease unto the said *C B* (then *C D*, spinster) all that messuage, &c. (the parcels), to hold the same, with the appurtenances, unto the said *C B*, her heirs and assigns, from the day of for and during the natural lives of *E F*, *G H*, and *I K*, and the life of the survivor or longer liver of them, at and under the yearly rents, and subject to the covenants and agreements therein reserved and contained, and on the part of the tenant or lessee to be paid, observed, and performed: AND WHEREAS the said *E F* hath departed this life: AND WHEREAS the said *A B*, and *C* his wife, being desirous of obtaining a renewal of the aforesaid lease in consequence of the death of the said *E F*, have applied to and requested the said Warden and Scholars to grant a new lease of the said demised premises, and which the said Warden and Scholars have agreed to do upon having the said recited indenture of lease, and the premises thereby demised, surrendered and given up in manner hereinafter mentioned; AND WHEREAS by an order of the high Court of *Chancery*, bearing date the day of and made on the petition of the said *A B*, and *C*, now his wife, it is ordered, (here recite the order): NOW THESE PRESENTS WITNESS, that in pursuance of the aforesaid agreement, and in obedience to the aforesaid order, and by virtue of the aforesaid act of parliament, mentioned in and referred to in the said order, and for and in consideration of the sum of 10*s.* a piece of lawful money of *Great Britain* to the said *A B*, and *C* his wife, paid by the said Warden and Scholars at or immediately before

Parties.

Recites, the lease intended to be surrendered.

The death of one of the lives, the application, and agreement to renew,

and the order of the Court of *Chancery*, directing the surrender.

(*a*) Vide *supra*, p. 106.

the sealing and delivery of these presents (the receipt whereof is hereby acknowledged); they the said *A B*, and *C* his wife, HAVE and each of them HATH surrendered and yielded up, and by this present deed DO and each of them DOTH surrender and yield up unto the said Warden and Scholars, the said messuage or tenement and premises hereinbefore described, and comprised in the aforesaid in part recited indenture of lease, with the appurtenances, AND also the said recited indenture of lease AND all the estate, right, title, interest, claim, and demand whatsoever of them the said *A B*, and *C* his wife, or either of them, of, in, to, and out of, the same premises, and every part thereof, TO THE END that all the subsisting estate and interest under the said indenture of lease of and in the said demised premises, may merge and be extinguished in the inheritance of the same premises, and TO THE INTENT and IN CONFIDENCE that the said Warden and Scholars shall and do grant a new lease of the same premises, pursuant to the aforesaid order. IN WITNESS, &c.

Husband and wife surrender

the demised premises, and

the lease,

to the Warden and Scholars,

to the end that the subsisting estate and interest therein may merge in the inheritance.

And to the intent, that a new lease may be granted pursuant to the order.

No. XIV.

Settlement of real estate for the separate Use of a married Woman (*a*).

THIS INDENTURE made the day of in the year of our Lord 1820, BETWEEN *E H* of of the first part, *A B* of , and *C D* of of the second part, and *T I* of and *S* his wife (late *S H*, the mother of the said *E H*) of the third part, WITNESSETH, that in consideration of the natural love and affection which the said *E H* hath and beareth for his mother the said *S I*, and for and in consideration of the sum of 10*s*. of lawful money of *Great Britain* to the said *E H* in hand well and truly paid by the said *A B* and *C D*, at or before the sealing and delivering of these presents (the receipt whereof is hereby acknowledged), he the said *E H*, with the privity and approbation of the said *T I* and *S* his wife (testified by their being parties to, and sealing and delivering of these presents, HATH granted, bargained, sold, aliened, released and confirmed, and by these presents DOTH grant, bargain, sell, alien, release and confirm unto the said *A B* and *C D* (in their actual possession now being by virtue of a bargain and sale to them thereof made, in consideration of 5*s*. by the said *E H*, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs, ALL, &c. (the parcels), together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments

Parties.

The consideration.

The settlor grants and releases, &c.

(reference to lease for a year).

Parcels and general words.

(*a*) See *supra*, p. 152.

and appurtenances whatsoever to the said messuages or tenements, lands, hereditaments and premises belonging, or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them or any part of them, or appurtenant thereunto, with their and every of their appurtenances: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the said messuages or tenements, lands, hereditaments and premises hereby granted and released, or intended so to be; AND all the estate, right, title, interest, inheritance, use, trust, property, claim and demand whatsoever, both at law and in equity, of him the said *E H*, of, in and to the same premises, and every part and parcel thereof, TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, unto the said *A B* and *C D*, and their heirs, TO SUCH USES, upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *S I*, notwithstanding her coverture, shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time, direct, limit or appoint; and for default of, and until such direction, limitation or appointment, and so far as any such direction, limitation or appointment shall not extend to the use of the said *A B* and *C D*, their heirs and assigns, during the joint lives of the said *T I* and *S* his wife, in trust, to collect, get in and receive the rents, issues and profits of the several hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, as and when the same shall become payable, and to pay the same to such person or persons, and for such intents and purposes as the said *S I* shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but so as not to dispose of or affect the same by way of sale, mortgage, charge or otherwise, in the way of anticipation), direct or appoint; or in default of such direction or appointment, into her own hands for her sole and separate use and benefit, independently and exclusively of her husband the said *T I*, and without being in anywise subject

HABENDUM.

To the releasees to such uses as the wife shall by deed appoint,

and for default of appointment, to the use of the releasees during joint lives of husband and wife, in trust to receive the rents,

and pay the same to such person as wife shall by any writing appoint, and in default of such appointment, into her own hands for her separate use.

to his debts, control, interference or engagements, and the receipts of the said *S I* or of her appointees, notwithstanding her coverture, to be from time to time sufficient discharges for the same; and if the said *S I* shall survive the said *T I*, then immediately after the decease of the said *T I* to the use of the said *S I*, her heirs and assigns for ever; but if the said *S I* shall die in the lifetime of the said *T I*, then to such uses, upon such trusts, and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *S I*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be respectively by her signed and published in the presence of and attested by three or more credible witnesses, direct, limit or appoint; and in default of such direction, limitation or appointment, and so far as any such direction, limitation or appointment shall not extend, to the use of the right heirs of the said *S I* for ever: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to the presents, that the receipt or receipts in writing of the said *A B* and *C D* (*see the form of this declaration in precedent No.* ix.): PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or any of them, as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed or discharged, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *S I*, notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates and premises which shall then be vested in the trustee or trustees

Receipts of wife to be sufficient discharges,

and if wife shall survive, then after decease of husband to the use of the wife in fee, but if husband shall survive, then to such uses as wife shall by will appoint,

and in default of such appointment, to wife's right heirs.

Declaration that the receipts of trustees shall be sufficient discharges.

Power to appoint new trustees.

so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, conveyed and assured in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates and premises respectively (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect; and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates and premises respectively, if there shall be any such continuing trustee or trustees, if not, then by himself or themselves as fully and effectually and with all the same power and powers, authority and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these presents if then living, and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared that the said several trustees hereby nominated and appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their

Clause to reimburse and indemnify the trustees.

giving or signing, or joining in giving or signing any receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each and every of them, only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: and also that it shall and may be lawful to and for them the said trustees, in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, administrators, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee or co-trustees all costs, charges, damages, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in, or about the execution of the aforesaid trusts, or in relation thereunto: AND the said *E H*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree to and with the said *A B* and *C D*, their heirs and assigns, by these presents in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said *E H*, or any of his ancestors, made, done, executed, committed, or willingly or knowingly suffered to the contrary, he the said *E H* now hath in himself good right, full power, and lawful and absolute authority to grant, release, convey, settle, and assure the said messuages or tenements, lands and hereditaments hereinbefore by these presents granted and released by him as aforesaid, with their respective appurtenances, to the several uses, upon the several trusts, and for the several intents and purposes, and under and subject to the several powers, provisoes, declarations, limitations, and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same respectively, according to the true intent and meaning of these presents: AND that all and singular the same messuages or tenements, lands, hereditaments, and premises shall and may from time to time, and at all times hereafter remain, continue, and be to and for the several uses,

Covenants by settlor, that he hath good right to convey, &c.

intents, and purposes, upon the trusts, and under and subject to the several powers, provisoes, declarations, and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same respectively, and shall and may be peaceably and quietly held and enjoyed accordingly, without any let, suit, trouble, denial, eviction, ejection, disturbance, interruption, claim, or demand whatsoever, of or by him the said *E H*, or his heirs, or any other person or persons lawfully or equitably claiming or to claim by, from or under, or in trust for him or them, or by, from, or under any of his ancestors; AND that free and clear, and freely and clearly acquitted, exonerated, released, and for ever discharged or otherwise by him the said *E H*, or his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all, and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, right and title of dower, uses, intails, trusts, wills, reversions, or remainders in the crown, statutes merchant, and of the staple, recognizances, judgments, extents, elegits, executions, rents, arrears of rent, annuities, legacies, sum and sums of money, yearly payments, forfeitures, re-entry, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of, from, and against all other estates, titles, troubles, charges, and incumbrances whatsoever, either already had, made, committed, done, executed, occasioned, or suffered, or hereafter to be had, made, committed, done, executed, occasioned, or suffered by him the said *E H*, or his heirs, or any other person or persons lawfully claiming or to claim by, from, or under, or in trust for him or them, or any of them: AND FURTHER, that he the said *E H*, and his heirs, and all and every other person or persons having or claiming, or who shall or may have or claim any estate, right, title, interest, trust, property, claim, and demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for him, or by, from, or under any of his ancestors, shall and will from time to time, and at all times hereafter, at the request of the said *S I*, but at the proper costs and charges of the said *T I* and *S I*, or one of them, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other acts, deeds,

For quiet enjoyment

Free from incumbrances.

And for further assurance.

things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely conveying, or assuring of the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, and every of them, and every part and parcel thereof, with their and every of their appurtenances, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisoes, agreements, and declarations hereinbefore limited, declared, and contained of and concerning the same, according to the true intent and meaning of these presents, be the same by fine or fines, common recovery or common recoveries, or any other matter of record or not of record, or otherwise howsoever, as by the said *S I*, or any of the parties interested in the premises, their or any of their counsel in the law, shall be reasonably devised or advised and required, so as such further assurances contain or imply in them no further or other covenant or warranty than against the person or persons who shall be required to make and execute the same, and his, her, or their heirs, executors, or administrators, acts and deeds respectively, and so as that the party or parties who shall be required to make and execute such further assurance or assurances, be not compelled or compellable to travel or go from the place or places of his or their respective abodes for the doing thereof. IN WITNESS, &c.

No. XV.

Gift by Will of Personal Estate to the separate use of a Married Woman (a).

Bequest to trustees in case testator's sister shall survive him, of 500*l.* upon trust,

to invest on government or real securities,

with power to vary securities, and during joint lives of husband and wife to pay interest and dividends to such persons as wife shall by writing appoint, but not by anticipation,

and in default into her own hands for her separate use.

Receipts of wife to be sufficient discharges.

And if wife survive, then to transfer trust monies, &c. to wife absolutely

AND I do hereby give and bequeath to the said *E F* and *G H*, in case my sister *C D*, the wife of the Reverend *H D*, of , shall survive me, but not otherwise, the sum of £500 sterling, UPON TRUST, that they the said *E F* and *G H*, and the survivor of them, and the executors, administrators, or assigns of such survivor, do and shall lay out and invest the same in their or his names or name, in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*: AND do and shall (with the consent in writing of my said sister during her life), alter, vary, and transpose the said stocks, funds, and securities, at their or his discretion; AND do and shall during the joint lives of the said *H D*, and *C D* his wife, pay and apply the interest, dividends, and annual produce of the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, to such person or persons, and for such intents and purposes as my said sister, *C D*, shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise, in the way of anticipation) direct or appoint; AND in default of such direction or appointment, into her own hands, for her sole and separate use and benefit, independently and exclusively of the said *H D*, her husband, and without being in any wise subject to his debts, control, interference, or engagements: And the receipts of my said sister or of her appointees, notwithstanding her coverture, to be from time to time sufficient discharges for the same: AND UPON FURTHER TRUST, that if the said *H D* shall depart this life in the lifetime of the said *C*, his wife, then and in such case, the

(a) See *supra*, p. 152.

said *E F* and *G H*, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall, immediately after the decease of the said *H D*, pay, transfer, or assign, the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, and the interest, dividends, and annual produce thereof, to the said *C D*, her executors, administrators, or assigns, for her or their proper use and benefit, and without being subject to any disposition of or by the said *H D*, during his lifetime: AND UPON FURTHER TRUST, that if the said *C D* shall depart this life in the lifetime of the said *H D*, her husband, then, and in such case, the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, from and after the decease of the said *C D*, stand and be possessed of and interested in the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, and the interest, dividends and annual produce thereof, upon and for such trusts, intents and purposes, as the said *C D*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of, or purporting to be, a will or codicil, direct or appoint: And in default of such direction or appointment, and so far as no such direction or appointment shall extend, IN TRUST for all and every the children and child of the said *C D*, by her present or any future husband, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry, to be divided between or among them, if more than one, in equal shares and proportions, and if there shall be but one such child, the whole to be in trust for that one child: AND if there shall be no child, in trust for the person or persons who, under the statute for the distribution of the effects of intestates, would, at the decease of the said *C D*, have become entitled to her personal estate if the said *H D* had died during her lifetime, and she the said *C D* had died unmarried and intestate.

But if husband be the survivor,

then trustees to stand possessed of trust monies, &c.

as wife shall by will appoint,

and in default of appointment

in trust for wife's children by present or a future husband.

but if no child, then in trust for wife's next of kin.

No. XVI.

A Settlement, before Marriage, to the Wife's separate use, of real and personal Estates to which she was then entitled, and to which she might become entitled during the Coverture (a).

Parties.

Recites the death of wife's father intestate, and her title to his freehold

and personal estates.

Also her title to two leases for lives,

THIS INDENTURE made the day of , in the year of our Lord 1820, BETWEEN *C D* of , spinster, (the heir at law and only next of kin of *W D* of , her late father deceased) of the first part, *A B* of esquire of the second part, and *E F* of *G H* of and *I K* of of the third part: WHEREAS the said *W D*, deceased, being at the time of his death seised or entitled of an estate of inheritance in fee simple in possession of or to the messuages or tenements, lands, and other hereditaments, hereinafter particularly described, and intended to be hereby granted and released, with their appurtenances, and being possessed of or entitled to a considerable personal estate, on or about the day of departed this life intestate, leaving the said *C D* his heir at law and only next of kin; AND WHEREAS by an indenture of lease, bearing date on or about the day of , and made or expressed to be made between the dean and chapter of of the one part, and the said *C D* of the other part: For the considerations therein mentioned, the said dean and chapter did grant and demise unto the said *C D* all that messuage, &c. (the parcels) with the appurtenances, to hold the same unto the said *C D*, her heirs and assigns, for and during the lives of the three several persons therein respectively named (and all of whom are still living), at, under, and subject to the rent, covenants, and agreements therein reserved and contained, and which on the tenants' or lessees' part are and ought to be paid, observed, and kept: AND WHEREAS by an indenture of lease, bearing date on or about the of , and made or expressed to be made between the said dean and chapter of the one part, and the said *C D* of the other part (*recites a*

(a) See *ante*, p. 178.

lease of other hereditaments to the same effect as the foregoing lease is recited): AND WHEREAS by a bond or obligation in writing, bearing date on or about the day of under the respective hands and seals of *W S* and *H T*, a sum of £4000 is secured to be paid by the said *W S* and *H T*, and their respective heirs, executors, and administrators, unto the said *C D*, her heirs, executors, administrators, and assigns, on the day of , which will be in the year of our Lord 1823, with interest thereon after the rate of 5 *per cent. per annum*, payable at the times therein mentioned: AND WHEREAS the said *C D* is also entitled to a sum of £2400 3 *per cent.* consolidated bank annuities: AND WHEREAS a marriage hath been agreed upon, and is intended shortly to be had and solemnised between the said *C D* and *A B*: AND WHEREAS upon the treaty for the said intended marriage, it was agreed that all and singular the real and personal estate of or to which the said *C D* is seised or entitled as hereinbefore is mentioned, and all other the real and personal property to which she the said *C D* now is, or which at any time during the said intended coverture she, or the said *A B* in her right, shall or may become entitled, should be settled and assured, so as that the same respectively during the continuance of such coverture might be for the separate use and absolute disposal of her the said *C D*: AND that, in consideration of such settlement she the said *C D* should relinquish in manner hereinafter mentioned all the right and title which she would otherwise in consequence of her marriage with the said *A B* have or derive to dower, freebench, or thirds out of the real estates of the said *A B*, or to any part or share of the personal estate of the said *A B*, under the statutes made for distribution of the estates of intestates: AND WHEREAS, in pursuance and part performance of the said agreement, she the said *C D* hath this day transferred the said sum of £2400 3 *per cent.* consolidated bank annuities into the names of the said *E F*, *G H*, and *I K*, in the books kept by the Governor and Company of the Bank of England for entering the transfers of the same stock, as they the said *E F*, *G H*, and *I K* do hereby respectively admit and acknowledge: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the said agreement, and in consideration of the said intended marriage, and also for and in consideration of the sum of 10*s.* of lawful money of Great Britain to the said *C D* in hand, well and truly paid by the said *E F*, *G H*, and *I K*, at or before the sealing and

to money secured by bond,

and to money in the funds.

Also recites the intended marriage,

and the agreement to settle wife's property to her separate use and disposal.

And in consideration thereof wife agrees to relinquish all right and title in husband's real and personal estates.

The transfer of the stock into the trustees' names.

delivery of these presents (the receipt whereof is hereby acknowledged), she the said *C D*, with the privity and approbation of the said *A B* (testified by his being a party to and sealing and delivering these presents), HATH granted, bargained, sold, aliened, released, and confirmed, and by these presents DOTH grant, bargain, sell, alien, release, and confirm unto the said *E F*, *G H*, and *I K* (in their actual possession, &c. *see the form of this recital in precedent, No.* 14), and their heirs, ALL THOSE MESSUAGES, &c. (the parcels) together with all and singular houses, outhouses, &c. (*see the general words in precedent, No.* 14): AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said messuages or tenements, lands, hereditaments, and premises, hereby granted and released, or intended so to be: AND all the estate, right, title, interest, inheritance, reversion, use, trust, property, claim, and demand whatsoever, both at law and in equity, of her the said *C D*, of, in and to the same premises and every part and parcel thereof: To HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their and every of their appurtenances, unto the said *E F*, *G H*, and *I K*, their heirs and assigns, to the use of the said *E F*, *G H*, and *I K*, their heirs and assigns for ever: UPON THE TRUSTS, nevertheless, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements and declarations hereinafter mentioned, expressed and declared of and concerning the same (that is to say), IN TRUST for the said *C D*, her heirs and assigns, until the said intended marriage shall be had and solemnised, and from and immediately after the solemnisation thereof, UPON TRUST that they the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, Do and shall during the joint lives of the said *C D* and *A B* convey and dispose of the said messuages or tenements, lands, and other hereditaments hereinbefore granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, to such person or persons for such estate or estates, interest or interests, and for such intents and purposes, and in such manner as she the said *C D* (notwithstanding her coverture) by any deed or deeds, instrument or instruments in writing, with or without powers of revocation and new appointment, to be by her sealed and delivered in the presence of and to be

The wife grants and releases the freehold hereditaments. (reference to lease for a year).

HABENDUM.

to the use of the releasees upon trust.

for the wife until marriage, and afterwards,

To convey and dispose of the same, as she by deed or will shall appoint,

attested by two or more credible witnesses, or by her last will and testament in writing, or by a codicil thereto, or any writing or writings in the nature of a will and codicil to be by her signed and published in the presence of and to be attested by three or more credible witnesses, shall from time to time direct or appoint; and in default of and until such direction or appointment, or so far as any such direction or appointment, if incomplete, shall not extend, do and shall, during the joint lives of the said *A B* and *C D*, collect, get in, and receive the rents, issues, and profits of the said messuages or tenements, lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, as and when the same respectively shall become payable; AND do and shall pay the same to, or permit and suffer the same to be received by such person or persons, and for such intents and purposes as she the said *C D*, by any note or notes in writing under her own hand, shall, from time to time, either as the same shall respectively become due, *or in the way of anticipation* direct or appoint, and in default of such direction or appointment, do and shall pay the same rents, issues, and profits into the proper hands of or permit the same to be received by the said *C D*, and to the intent that the said messuages or tenements, lands, and other hereditaments, and the rents, issues, and profits of the same may, during the said intended coverture, be for the sole, separate, and particular use and benefit, and at the sole and uncontrolled disposal of the said *C D*, notwithstanding her said intended coverture, and may not be subject to the debts, control, forfeiture, or engagements of the said *A B*, her said intended husband: AND it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts of the said *C D*, or of such person or persons as she shall from time to time appoint to receive the said rents, issues, and profits, in manner aforesaid, and her and their receipt and receipts only shall be a good and sufficient discharge, and good and effectual discharges to the said *E F*, *G H*, and *I K*, and the survivor or survivors of them, and the heirs and assigns of such survivor, or to the person or persons paying the said rents, issues, and profits for so much thereof as in such receipt or receipts shall be expressed or acknowledged to be received: AND UPON THIS FURTHER TRUST, that if the said *C D* shall happen to survive the said *A B*, the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs and assigns of such survivor, do and shall,

And in default,

to receive the rents, and pay the same,

as wife by any note in writing under her hand shall direct, and in default of such direction,

into her own hands for her separate use.

Wife's receipts to be sufficient discharges.

And upon further trust if wife shall survive,

then immediately after decease of husband to convey the hereditaments

to wife in fee,

but if husband should be the survivor,

then after decease of wife to convey hereditaments

unto the wife's right heirs.

The wife grants and releases the leasehold hereditaments.

immediately after the decease of the said *A B*, so dying in the lifetime of the said *C D*, convey the said messuages or tenements, lands and other hereditaments, or such part or parts of the same as shall then remain undisposed of, under the trusts and powers hereinbefore contained, with their appurtenances, unto the said *C D*, her heirs and assigns, for his and her own proper use and benefit; but if the said *C D* shall depart this life in the lifetime of the said *A B*, then that the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, immediately after the decease of the said *C D*, so dying in the lifetime of the said *A B*, convey the said messuages or tenements, lands, and other hereditaments, or such part or parts of the same as shall then remain undisposed of, under the trusts and powers hereinbefore contained, with their appurtenances, unto the right heirs of the said *C D* for ever, for a legal estate of inheritance: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, and for the considerations aforesaid, and also for and in consideration of the further sum of 10*s*. of like lawful money to the said *C D* in hand well and truly paid by the said *E F*, *G H*, and *I K*, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged): She, the said *C D*, with the like privity and approbation of the said *A B* (testified as aforesaid), HATH granted, bargained, sold, and released, and by these presents DOTH grant, bargain, sell, and release, unto the said *E F*, *G H*, and *I K*, in their actual possession (*see the form of this recital in the first operative part of this precedent*), and to their heirs, the said messuage or tenements, lands, and all and singular, other the premises comprised in, and granted, demised, or otherwise assured by the hereinbefore in part recited indenture of lease, of the day of , with their appurtenances: AND ALSO the said pieces or parcels of lands, hereditaments, and all and singular other the premises comprised in and demised by the hereinbefore in part recited indenture of lease, of the day of , with their appurtenances: AND all the estate, right, title, interest, term, and terms for years, right and benefit of renewal, property, possibility, claim, and demand whatsoever, both at law and in equity, of her the said *C D*, of, in, to, or out of the same premises respectively, and every of them, and every part and parcel thereof respectively, together with the said several indentures of lease, and all benefit and advantage thereof respectively: TO HAVE

AND TO HOLD the said several messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore lastly released or expressed and intended so to be, with their and every of their appurtenances, unto the said *E F*, *G H*, and *I K*, their heirs and assigns; TO THE USE of them the said *E F*, *G H*, and *I K*, their heirs and assigns, for and during the lives of the several persons respectively, upon or for whose lives or life, by virtue of the said several indentures, or any renewed lease or leases of the same leasehold premises respectively, or any of them, the same leasehold premises respectively, or any of them now are, or hereafter shall be held, subject nevertheless to the payment of the rents and to the performance and observance of the several covenants and agreements, by and in the said several indentures of lease of the same premises respectively reserved and contained, and which are or ought henceforth, on the tenant's or lessee's part, to be paid, observed and kept: BUT UPON THE TRUSTS, nevertheless, and for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as are hereinbefore mentioned, expressed, and declared, of and concerning the freehold hereditaments and premises hereinbefore granted and released, or as near thereto as the nature and quality of the said estates respectively will admit of: AND UPON THIS FURTHER TRUST, that in the mean time, and until the said leasehold hereditaments and premises shall be absolutely sold or disposed of under the trusts or powers hereinbefore contained, they the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs and assigns of such survivor, do and shall, by and out of the rents and profits of the same leasehold premises yearly and every year, and at all other times, duly pay, satisfy, and perform the several rents, reservations, covenants, and agreements, which are respectively reserved and contained in the said several indentures of lease, and which in and by any renewed lease or leases to be from time to time renewed and taken of the same premises respectively shall be reserved and contained, and which, on the part of the tenants or lessees thereof, are or shall or ought to be paid or performed: AND UPON THIS FURTHER TRUST, that the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall renew the said leases from time to time as occasion shall require: AND for that purpose do and shall make such surrenders of the hereditaments so to be renewed as shall be requisite, and ne-

HABENDUM.

To the use of the releasees

upon the trusts declared of the freehold hereditaments.

And upon further trust, until sale of the leasehold hereditaments, out of the rents to pay and satisfy the rents and covenants in the leases.

And upon further trust to renew the leases,

cessary or proper in that behalf, AND for that purpose do and shall, by and out of the rents and profits of the same leasehold premises respectively, or by mortgage thereof, or of any part thereof, or by such other ways or means as they or he shall think proper, raise such sum or sums of money as shall be sufficient to pay and satisfy the several fines, fees, and other necessary charges and expenses of such renewal; AND do and shall pay and apply the money so to be levied or raised, in or towards the effecting such renewal or renewals accordingly: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, and for the considerations aforesaid, and for and in consideration of the sum of 10*s.* of like lawful money to the said *C D* in hand, well and truly paid by the said *E F*, *G H*, and *I K*, as hereinbefore is mentioned (the receipt whereof is hereby acknowledged), she, the said *C D*, with the like privity and approbation of the said *A B* (testified as aforesaid), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, ALL that the said sum of £4000, secured as hereinbefore is mentioned, and all interest now due or henceforth to grow due for the same, together with the said in part recited bond or obligation, and the full benefit thereof, AND all sums of money and personal estate whatsoever, to which the said *C D* now is or hereafter may be or become intitled as next of kin of the said *W D*, her late father, under the statutes made for distribution of the estates of intestates, or by the custom of the province of York, or otherwise howsoever; AND all the right, title, interest, property, possibility, claim and demand whatsoever, both at law and in equity, of her the said *C D*, of, in, or to the same premises respectively, or any part thereof respectively, WITH full power and authority to ask, sue for, recover and receive, and to give effectual receipts and discharges for the said monies, and interest, and premises, hereinbefore assigned, and every or any part thereof respectively: TO HAVE, HOLD, receive, and take the said sum of £4000, and interest, and the said sums of money, personal estate, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, UPON THE TRUSTS, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, or declared, and con-

and out of the rents, or by mortgage, to raise money to pay the fines on such renewals.

Assignment by the wife of the money due on the bond, and other her personal estate, to which she is intitled as next of kin of her father or otherwise.

HABENDUM.

tained of and concerning the same: AND it is hereby agreed and declared, between and by the parties to these presents, that the said *E F, G H,* and *I K,* and the survivors and survivor of them, and the executors, administrators or assigns of such survivor, do and shall stand and be possessed of and interested in the said sum of £4000 and interest; AND of and in the said sums of money, and personal estate, to which she the said *C D* now is or hereafter may be or become intitled as aforesaid: AND ALSO of and in the said sum of £2400 £3 per cent. consolidated bank annuities, so transferred into the names of them the said *E F, G H,* and *I K,* as hereinbefore is mentioned; and of and in the dividends, interest and annual produce thereof upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared of or concerning the same respectively (that is to say), IN TRUST for the said *G D,* her executors, administrators, and assigns, in the mean time, and until the said intended marriage shall be had and solemnized, and from and immediately after the solemnization thereof: UPON TRUST that they the said *E F, G H,* and *I K,* and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, do and shall pay, transfer, assign, or otherwise dispose of all and singular the trust monies, stocks, funds, securities, and premises so respectively assigned and transferred, as hereinbefore is mentioned, and the interest, dividends, and annual produce thereof respectively, and every or any part or parts of the same respectively, to such person or persons, for such intents and purposes, and in such manner as she the said *C D,* notwithstanding her said intended coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament in writing, or any writing in the name of or purporting to be a will or codicil, shall from time to time direct or appoint; and in default of and until such direction or appointment, and so far as any such direction or appointment if incomplete shall not extend, UPON THIS FURTHER TRUST, that they the said *E F, G H,* and *I K,* and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor Do and shall call in and receive the said sum of £4000, and interest; and also all and every the sums and sum of money and personal estate whatsoever to which the said *C D* is or may be so intitled as hereinbefore is mentioned, as and when the same

Declaration that the trustees shall stand possessed of the assigned premises and of the stock transferred into their names.

In trust for the wife until the marriage,

and afterwards upon trust to pay or assign the same, or any part or parts thereof,

as wife shall by deed appoint,

and in default of appointment, upon further trust,

to call in the money due on the bond and personal estate,

to sell such part of the personal estate not consisting of money, and invest produce with the other trust monies,

respectively shall become due and payable; And do and shall sell and dispose of such part of the said personal estate as shall not consist of money, for such price or prices as they or he shall think fit: And do and shall (with the consent in writing of the said *C D*), lay out or invest the money to arise by or from such sale or disposition; and also the said sum of £4000, and interest, and the said several sums or sum of money, as and when the same shall be received in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England: And do and shall from time to time (with such consent as aforesaid), alter, vary, and transfer the same stocks, funds, and securities, as to them or him shall seem meet: And do and shall either permit and suffer the said sum of £2400 3 per cent consolidated Bank Annuities, to remain in its actual state of investment, or do and shall (at any time or times, with such consent as aforesaid), sell, transfer, or dispose of the same or any part or parts thereof, for such price or prices as they or he shall think fit: And do and shall (with such consent as aforesaid) lay out and invest the money to arise by or from such sale, transfer, or disposition, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England: And do and shall from time to time (with such consent as aforesaid) alter, vary, and transfer the same stocks, funds, and securities, as to them or him shall seem meet: And do and shall stand and be possessed of and interested in all and singular the said trust monies, stocks, funds, securities, and premises hereinbefore respectively mentioned; and the interest, dividends, and annual produce thereof respectively upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, declared, or contained, of or concerning the same (that is to say), upon trust that they, the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, during the joint lives of the said *C D* and *A B*, pay the interest, dividends, and annual produce of the said several trust monies, stocks, funds, securities, and premises, as and when the same shall respectively become due, and be received into the proper hands of the said *C D*, or into the hands of such per-

on government or real securities, with power to vary the securities, and permit the stock transferred to remain as invested, or sell and transfer the same, and invest produce on like securities,

with power to vary such securities, and to stand possessed of all the trust-monies, securities, and premises.

Upon trust,

to pay the interest and dividends, &c.

into wife's hands,

son or persons, and for such intents and purposes as she the said *C D*, notwithstanding her said intended coverture, by any note or writing under her hand shall from time to time direct or appoint, to the intent that the same may be for the sole and separate use and at the absolute and uncontrolled disposal of the said *C D*, and may not be liable to the debts, control, forfeiture or engagements of the said *A B*, her said intended husband. AND it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts of the said *C D*, or of her appointee or appointees, shall be a good and effectual discharge and good and effectual discharges for the said interest, dividends, and annual produce, or for so much thereof as in such receipt or receipts shall be expressed or acknowledged to be received: AND UPON THIS FURTHER TRUST that if the said *C D* shall survive the said *A B*, the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, do and shall immediately upon the decease of the said *A B*, so dying in the lifetime of the said *C D*, pay, transfer, and assign the said trust monies, stocks, funds, securities, and premises, and the interest, dividends, and annual produce, or such part or parts of the same respectively as shall be then unappointed and undisposed of, after answering the trusts and purposes hereinbefore contained, unto the said *C D*, her executors, administrators, or assigns. BUT if the said *C D* shall depart this life in the lifetime of the said *A B*, then do and shall pay, assign, and transfer the said trust monies, stocks, funds, securities, and premises and the interest, dividends, and annual produce, or such part or parts thereof respectively as shall be then unapplied, unappointed, and undisposed of after answering the trusts and purposes hereinbefore contained, to the person or persons who under the statutes made for the distribution of the estates of intestates would then be intitled thereto in case the said *C D* had died unmarried and intestate: AND WHEREAS the said *C D* is possessed of ready money, and of household furniture, plate, linen, china, wine, and other effects, all or most of which are now in her house, at []: AND she is likewise possessed of jewels, trinkets, and other ornaments of her person and other effects: AND upon the treaty for the said marriage it was agreed that the same should, notwithstanding the said intended coverture, be retained by the said *C D* for her separate use, and be disposed of by her at her free will and pleasure as she should from time to time think proper. Now,

or as she by note or writing shall appoint.

For wife's separate use.

Wife's receipts to be sufficient discharges;

and upon further trust if wife shall survive;

then upon husband's decease, to pay, transfer, and assign trust-monies, securities, and premises to wife absolutely.

But if husband should be the survivor,

then to pay, transfer, and assign trust-monies, securities, and premises, to wife's next of kin.

And recites that wife is possessed of ready money, household furniture, and other property.

And the agreement that such property should be retained by her for her sepa-

rate use, and disposed of at her pleasure.

COVENANT by husband to permit his wife to use and retain such property for her separate use,

and to dispose of the same by her will;

and all her savings.

FURTHER COVENANT by husband that if wife shall acquire any real or personal estates during the coverture, he will do all acts necessary for conveying and assigning the same to the trustees upon the trusts of the settlement.

THEREFORE THIS INDENTURE FURTHER WITNESSETH that in pursuance of such agreement, and in consideration of the said intended marriage, he the said *A B*, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, that in case the said intended marriage shall take effect, he the said *A B*, his executors and administrators, shall and will permit and suffer the said *C D*, his said intended wife, from time to time and at all times thereafter, notwithstanding the said intended coverture, to have, use, retain, wear, and enjoy, to and for her sole and separate use and as her own separate property, and either in her lifetime or by her last will and testament in writing, or by any writing in the nature of her will, or any codicil thereto, to be signed by her own hand, to give away and dispose of to any person or persons whomsoever, all and every or any of the household furniture, plate, linen, china, wine, books, jewels, trinkets, and other ornaments of her person, sums of money, and effects whatsoever, which the said *C D* is now possessed of, as hereinbefore is mentioned; and all savings of the same, and all sums of money and effects whatsoever which may arise or be produced by any sale, disposition, or conversion of the same: AND it is hereby further agreed and declared, and the said *A B* doth for himself, his heirs, executors, and administrators, further covenant, promise, and agree with and to the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, by these presents in manner following (that is to say), that if at any time during the said intended coverture any real or personal estate whatsoever shall descend or devolve to or vest in the said *C D*, or in any persons or person in trust for her, or to or in the said *A B* in her right, then and in that case and so often as the same should happen, he the said *A B* shall and will, at the costs and charges of the said *C D*, make, do, and execute, or cause or procure to be made, done, and executed, or join or concur with the said *C D*, her heirs, executors, or administrators, in the making, doing, and executing of all such acts, deeds, conveyances, assignments, and assurances in the law whatsoever as shall be necessary and proper for conveying, assigning, assuring, and confirming the said real and personal estate in such manner as that (regard being had to the nature and quality of the same) the said real and personal estate shall and may be vested in the said *E F*, *G H*, and *I K*, their heirs, executors, administrators, and assigns, upon such trusts,

intents, and purposes as will correspond or best and nearest correspond with the trusts, intents, and purposes hereinbefore expressed and contained of and concerning the real and personal estate hereinbefore mentioned, and the trusts thereof hereinbefore declared: AND the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, that he the said *A B*, his heirs, executors, or administrators shall not nor will at any time or times prevent or obstruct the said *C D*, her heirs, appointees, executors, administrators, or assigns, from holding, enjoying, receiving, taking, and disposing of the said estates, monies, stocks, funds, securities, and premises hereinbefore mentioned, in the manner hereinbefore expressed, and according to the true intent and meaning of these presents: AND THAT if the said *C D* shall depart this life in the lifetime of the said *A B*, he the said *A B*, his heirs, executors, and administrators shall and will permit the will and codicils of the said *C D* to be proved by the executors or executor therein named: AND THAT if the said *C D* shall die intestate, then shall and will permit the administration of her effects to be granted to the person or persons who would be entitled to administer to her in case she the said *C D* had survived him the said *A B*: AND THAT he the said *A B*, his heirs, executors, and administrators shall and will from time to time, and at all times hereafter upon the request and at the proper costs and charges in the law of the said *C D*, her heirs, executors, administrators, or assigns, or of the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, make, do and execute, or cause or procure to be made, done and executed all such further and other lawful and reasonable acts, deeds, assignments, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, bargaining, selling, assigning, assuring and confirming the several estates, sums of money, stocks, funds, securities, rents, issues, profits, interests, dividends and annual produce, and other effects hereinbefore mentioned, and the trusts whereof are hereinbefore declared, and every of them and every part of the same respectively unto the said *E F*, *G H*, and *I K*, their heirs, executors, administrators, and assigns respectively, upon the trusts, intents and purposes hereinbefore mentioned and declared of and concerning the same respectively; and for the further and better

And for quiet enjoyment.

And that if he should survive his wife to permit her will to be proved.

And if wife die intestate, to permit administration of her effects to be granted to her own next of kin.

And for further assurance.

enabling them the said *E F*, *G H*, and *I K*, their heirs, executors, administrators and assigns to carry the trusts hereby created into execution, as by the said *C D*, her heirs, executors, administrators or assigns, or by the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs, executors, administrators or assigns of such survivor, or his, her or their, or any of their counsel in the law shall be advised, devised, or required: AND THIS INDENTURE LASTLY WITNESSETH, that in consideration of the said intended marriage, and that the said real and personal estates of the said *C D* are hereby settled for her separate use, benefit and disposition, as hereinbefore is mentioned, it is hereby agreed and declared between and by the parties to these presents: AND the said *C D* doth hereby for herself, her heirs, executors and administrators covenant, promise and agree with and to the said *A B*, his heirs, executors, administrators and assigns; and also with and to the said *E F*, *G H*, and *I K*, their heirs, executors, administrators and assigns, that the settlement hereinbefore contained, and hereinbefore made of the real and personal estate of her the said *C D* shall be, and the said *C D* doth hereby accordingly accept the same for her jointure, and in lieu, bar, and in full satisfaction of the dower, thirds and free bench, and every other estate or right which at common law or by custom, or otherwise, the said *C D* might be entitled to or might claim from the real estate of the said *A B*; and also of every part and share which, if the said *C D* should survive the said *A B*, she, the said *C D*, might claim of or in his personal estate, under any custom whatsoever, or under any statute made for the distribution of the estate of intestates: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F*, *G H*, and *I K*, (*see the form of this declaration in precedent*, No. IX.): PROVIDED ALWAYS and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged; then and in such case, and when and so often as the same shall happen, it shall and may be lawful

Covenant by wife to accept the settlement in bar of her dower, &c. and of her interest in her husband's personal estate.

Declaration that the receipts of trustees shall be sufficient discharges.

Power to appoint new trustees.

to and for the said *C D*, notwithstanding her coverture by any deed or deeds, instrument or instruments, in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, monies and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees shall be thereupon, with all convenient speed, conveyed, assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, monies and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies and premises respectively (the trustee or trustees whereof shall so die or be desirous of being discharged, or refuse, decline or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect; AND that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates, monies and premises respectively, if there shall be any such continuing trustee or trustees, if not then by himself or themselves, as fully and effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, calling in, laying out, and investing, giving, and signing receipts, and effectual indemnifications and discharges to purchasers, mortgagees or others, and all other powers and authorities whatsoever, to all intents, effects, constructions and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustees or trustee for the purposes for which such new trustee or trustees, and as the trustee or trustees in these presents named

his or their heirs, executors or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding; PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies, &c. (*see the form of this clause in precedent*, No. IX). IN WITNESS, &c.

Clause for indemnifying the trustees.

No. XVII.

Appointment of a married woman by Deed of settled property in favour of her husband, under a power reserved to her by marriage settlement (*a*).

THIS INDENTURE made, &c. BETWEEN *J W*, wife of *T W*, of &c. (before her marriage *J D*, spinster) of the one part, and the said *T W* of the other part: WHEREAS by indentures of lease and release bearing date respectively the days of the release being made or expressed to be made between the said *T W* of the first part, the said *J W* (then *J D*, spinster) of the second part, and *G H* and *W Y* of the third part (being the settlement made previously to and in contemplation of the marriage then intended, and which was soon afterwards duly had and solemnized between the said *T W* and *J* his wife); it is witnessed, that in consideration of the said then intended marriage, and for other considerations therein mentioned, the said *J W* did grant, release and confirm unto the said *G H* and *W Y* and their heirs all that messuage, &c. (the parcels) with their appurtenances, to hold the same under the said *G H* and *W Y* their heirs and assigns, to the uses upon and for the intents and purposes in the said indenture of release now in recital, expressed and declared of and concerning the same, and in part hereinafter mentioned (that is to say) to the use of such person or persons, and to and for such estate and estates, and with, under and subject to such powers, provisoes, agreements, and declarations as the said *J W*, notwithstanding her coverture, and whether covert or sole, by any deeds or deed, writings or writing, to be by her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her last will and testament to be by her executed as therein mentioned, should direct, limit, or appoint: AND WHEREAS by an indenture bearing date on, &c. and made, or expressed to be made, between the said *T W*, and *J* his wife, of the one part, and *P S*, spinster, of the other part;

Parties.

Recites the settlement creating the power.

A deed creating a term for securing a mortgage debt.

(*a*) See *ante*, p. 216.

it is witnessed that in consideration of the sum of £350 paid to the said *T W*, and *J* his wife, by the said *P S*, she the said *J W*, with the privity and approbation of the said *T W*, (testified as therein mentioned), by force and virtue, and in exercise and execution of the power and authority given and reserved to her the said *J W* in and by the aforesaid in part recited indenture of release as aforesaid, and of every or any other power or authority enabling her in that behalf, did direct, limit, and appoint that the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of release should go, remain, and be, and that the said *G H* and *W Y*, their heirs and assigns, should thenceforth stand and be seised of and in the same premises, to the use of the said *P S*, her executors, administrators, and assigns, for the term of 1000 years, thenceforth next ensuing, without impeachment of waste, subject nevertheless to the proviso and agreement in the said indenture now in recital contained, for making void the same term on payment by the said *T W*, and *J* his wife, or either of them, their or either of their heirs, executors, or administrators, or the person or persons who for the time being should be entitled to the reversion, freehold, or inheritance of the said premises, comprised in the said term of 1000 years, immediately expectant upon the determination of the same term, unto the said *P S*, her executors, administrators, or assigns, of the sum of £350, with interest for the same, after the rate and at the time in the said indenture now in recital mentioned and appointed for payment of the same respectively: AND WHEREAS the said principal sum of £350, with an arrear of interest thereon, still remains due and owing to the said *P S*, or her executors, administrators, or assigns, upon or by virtue of the aforesaid security: AND WHEREAS the said *J W* is desirous to make an appointment of the reversion, freehold, and inheritance of the said messuage or tenement and premises comprised in the aforesaid in part recited indenture of release in favour or for the benefit of the said *T W* her husband, his heirs, and assigns, from and after the decease of her the said *J W* (subject nevertheless to the said mortgage thereof so made as aforesaid): NOW THIS INDENTURE WITNESSETH, that for the purpose of effectuating the end, intent, and purpose aforesaid, she the said *J W*, by force and virtue, and in exercise and execution of the power and authority so given or limited to her the said *J W* by the aforesaid in part recited indenture of release as hereinbefore mentioned, and of every or any other

That the mortgage debt and interest are due.

The wife's desire to appoint the reversion in favour of her husband after her decease.

THE APPOINTMENT.

power or authority in any wise enabling her in this behalf, with the privity of the said *T W*, her husband (testified by his being a party to and executing these presents), HATH directed, limited, and appointed, and by this present deed or writing, sealed and delivered by her the said *J W* in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said *J W*, DOTH direct, limit, and appoint, THAT the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of release, and by her limited in mortgage to the said *P S*, her executors, administrators, and assigns as aforesaid, with their appurtenances, shall, from and after the decease of her the said *J W*, go, remain, and be, and that the said *G H* and *W Y*, their heirs and assigns, shall thenceforth stand and be seised of and in the same premises, to the use of the said *T W*, his heirs and assigns for ever, (subject nevertheless to the said mortgage thereof so made to the said *P S*, her executors, administrators, and assigns, for the term of 1000 years, for securing to her and them the payment of the principal sum of £350, and interest for the same, as hereinbefore mentioned). IN WITNESS, &c.

No. XVIII.

The Will of a married Woman under a Power reserved to her by Settlement (*a*).

THIS IS THE LAST WILL AND TESTAMENT of me *A*, wife of *B*, of, &c. made by virtue of the power of appointment reserved to me in manner hereinafter mentioned: WHEREAS under the settlement executed previously to and in contemplation of my marriage, a certain sum in the *3 per cent.* consolidated bank annuities, or in some other of the parliamentary stocks or public funds of *Great Britain*, together with a leasehold messuage situate in the county of *Middlesex*, and one-fourth part or share of certain policies of assurance on the life of my father, and on the life or lives of some other person or persons, are vested in *E F* of and *G H* of upon certain trusts for the benefit of my said husband *B* for his life, and after his death, for my benefit during my life, and after the death of the survivor of us, for the benefit of the issue of our marriage, and with power for me, in case of my dying in the lifetime of my said husband, and in default of my having any child by my said husband, who should become entitled to the said trust monies and premises under the trusts aforesaid, to appoint and dispose of the same by any will, or writing in the nature of a will, to be executed as therein mentioned, subject to the life interest of my said husband therein. Now I the said *A*, in execution of the said power of appointment, and of every or any other power enabling me in this behalf, do by this my last will, or writing in the nature of a will, signed and published by me in the presence of and attested by three credible persons, whose names are hereunder subscribed as witnesses, direct and appoint; THAT from and after the decease of my said husband, and such default or failure of children of our said marriage as aforesaid, the said capital stock, and also the said leasehold messuages with the appurtenances, and also the said fourth part or share of the said several policies of as-

Recital of the settlement creating the power.

Appointment of trust monies after the death of the husband and failure of issue.

(*a*) See *ante*, p. 216.

surance, and of the monies to be received by virtue of the same respectively, and all other the trust monies and premises, which by virtue of my said marriage settlement, I have power to dispose of, bequeath, or appoint, shall respectively go, remain, and be, and the said *E F* and *G H*, their executors, administrators, or assigns, shall stand and be possessed of and interested in the same, in trust for my said husband *B*, his executors, administrators, and assigns, and I give and bequeath the same to him and them accordingly, and I do hereby nominate and appoint my said husband *B* sole executor of this my last will and testament. IN WITNESS, &c.

To trustees for husband absolutely.

No. XIX.

Deed of Separation (*a*).

Parties.

THIS INDENTURE made the day of in the year, &c. BETWEEN *A B* of of the first part, *H B* of (the son of the said *A B*) of the second part, *C B* of (the wife of the said *H B*, but now living separate and apart from him) of the third part, *E F* of and *G F* of (which said *E F* and *G F* are the brothers of the said *C B*) of the fourth part, and *I K* of and *L M* of of the fifth part: WHEREAS unhappy differences have arisen and do subsist between the said *H B*, and *C* his wife, and in consequence whereof they have agreed to live separate and apart from each other: AND WHEREAS by indentures of lease and release, bearing date respectively the days of 1816, the release being made, or expressed to be made, between *H L* of the first part, the said *A B* of the second part, the said *H B* of the third part, *B R* of the fourth part, *C O* of the fifth part, *R D* of the sixth part, *H C* of the seventh part, and *T C* of the eighth part; and by two common recoveries duly suffered by the said *H L*, *A B*, and *H B*, in or as of *Hilary* Term, in the said year 1816, in pursuance of the said indenture of release, and by force of a declaration of the uses of the said common recoveries in the same indenture contained; and also by a deed poll or instrument in writing, under the hands and seals of the said *H L*, *A B*, and *H B*, bearing date on or about the day of and a deed poll or instrument in writing, under the hands and seals of the said *A B* and *H B*, bearing date the day of one undivided moiety of and in the manors or lordships, towns, messuages, lands, tenements, and hereditaments, and the entirety of the rectories or advowsons hereinafter particularly mentioned, were conveyed, limited, and assured, and do now stand settled, subject, and liable to such uses, upon and for

Recites that husband and wife have agreed to live separate, and the conveyances under which the husband and his father derive their power hereinafter exercised to charge the hereditaments hereinafter appointed,

(*a*) See *ante*, p. 281, and see a more simple deed of separation in the following precedent, No. 20.

such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as the said *A B* and *H B* shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time direct, limit, or appoint: AND WHEREAS upon the treaty for the said separation, it was agreed between the said parties hereto, that the said *H B* should by his bond or obligation in writing, secure unto the said *C B* for her separate use, one annuity or clear yearly sum of £300 during the joint lives of her and the said *H B*; and that the said *A B* and *H B* should charge the said undivided moiety, and the said rectories and advowsons, with an annuity or yearly rent charge of £500, for the benefit of the said *C B*, to commence from the death of the said *A B*, if the said *C B* shall then be living, and whether the said *H B* shall then be living or not, and also, that the said *E F* and *G H* should enter into the covenant hereinafter contained: AND WHEREAS, in pursuance and part performance of the aforesaid agreement in his behalf, he the said *H B* hath by his bond or obligation in writing under his hand and seal, bearing even date with these presents, become bound unto the said *E F* and *G H* in the penal sum of £ with a condition thereunder written, for making the same void on payment by the said *H B* unto the said *C B*, for her separate use and benefit, of one annuity or clear yearly sum of £300, during the joint lives of him and the said *C B*, or to such person or persons as she by any writing under her hand shall from time to time, notwithstanding her coverture, direct or appoint, on or at the days or times therein particularly mentioned and appointed for payment thereof: NOW THIS INDENTURE WITNESSETH that in pursuance and further performance of the said agreement on the part of the said *H B*, he the said *H B*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with and to the said *E F* and *G F*, their executors, administrators, and assigns, by these presents in manner following (that is to say), that notwithstanding the marriage that was had and solemnized between the said *H B* and *C B* his wife, it shall and may be lawful to and for the said *C B*, from time to time, and at all times hereafter, to live separate and apart from him the said *H B*, in such sort and manner as if she were sole and unmarried, and that he the said *H B* shall

and the husband's agreement to secure to wife by bond an annuity for her separate use,

and to charge the estates of husband and his father with a rent charge for the benefit of the wife, and the agreement of wife's brothers, to indemnify husband against her debts.

Also recites the husband's bond of even date.

Husband covenants, that wife may live separate from him,

not, nor will compel her to cohabit or live with him, by any ecclesiastical censure or proceedings, or otherwise howsoever;

free from his control,

and that she, the said *C B*, shall be absolutely, and to all intents and purposes whatsoever, freed and discharged from the power, command, will, restraint, authority, and government of him the said *H B*; and that he shall not, nor will at any time hereafter, by any cause, or under any pretence whatsoever, sue or prosecute any person or persons for receiving, harbouring, protecting, or assisting the said *C B*, or ill treat, or use, or offer any violence, force, or restraint, to the person of her the said *C B*, or molest, interrupt, or disturb her in her way of living, or in her liberty or freedom of going to or staying in or returning from such place or places as she shall think fit; AND ALSO, that it shall and may be lawful to and for the said *C B*, from henceforth to have, take, and enjoy to her own separate and absolute use, notwithstanding her coverture, all such jewels, plate, furniture, clothes, linen, wearing apparel, and ornaments, articles and things whatsoever, as now are or which at any time or times hereafter, shall be hers or reputed hers, or which she shall save from the provision hereby made for her separate use, and from time to time by deed or will, or from hand to hand, to sell, give away, or dispose of the same; and that if the said *C B* shall depart this life in the lifetime of the said *H B*, he, the said *H B*, will permit and suffer *the last will and testament* of the said *C B*, or any writing in the nature of or purporting to be her last will and testament, and codicil or codicils thereto, to be proved in the proper ecclesiastical court, by the person or persons to be therein named or appointed the executor or executors thereof; and that if the said *C B* shall not name or appoint an executor or executors of her said will, or such executor or executors shall die in her lifetime, or refuse to prove her said will or to act in the executorship thereof, or if the said *C B* shall die intestate, as to all or any part of the said premises hereinbefore declared or directed to be for her separate use or disposal, he the said *H B*, shall and will permit *administration* of the goods, rights, and credits of the said *C B*, to be taken out by the person or persons who would be intitled thereto if the said *C B* had not married the said *H B*, and shall and will permit and suffer the said personal estate and effects of the said *C B*, or so much thereof of which she shall die intestate, to be distributed among the persons, and in the manner among whom and in which the same by the statute for the distribution of the effects of intestates would be distributable if the said *C B* had not married the said

and that he will not molest her,

that she may have and enjoy to her separate use, her jewels, clothes, and ornaments, &c. and her savings, and by deed or will sell or dispose of the same, and if she shall die before him, to permit her will to be proved,

or if she die intestate, administration to be taken out by her next of kin.

H B: AND THAT all such estates, real and personal, as during the joint lives of the said *H B* and *C B* his wife, shall descend or come to, or devolve upon, or be given, or devised, or bequeathed, or conveyed to, or in trust for her the said *C B*, or to, or for, or upon him the said *H B*, in right of the said *C B* his wife, shall be holden, enjoyed, sold, given away, devised, bequeathed, and disposed of by the said *C B*, her heirs, executors, administrators, and assigns respectively, according to the several natures and qualities thereof respectively, in such manner as she or they shall think fit, without being subject to the debts, control, claims, custody, or intermeddling of him the said *H B*, as if she, the said *C B*, had not married the said *H B*: And also, that he, the said *H B*, shall and will, for that purpose, make, do, and execute, all such acts, deeds, devices, and assurances in the law whatsoever, for confirming and corroborating these presents, and every clause, matter, and thing herein contained, as by the said *E F* and *G F*, their executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and performance of the aforesaid agreement on the part of the said *A B* and *H B*, and pursuant to, and by force and virtue, and in exercise and execution of the powers and authorities to them for this purpose given or limited by the hereinbefore in part recited indenture of release, of the day of 1816, and the said deeds poll, of the day of , day of , and day of , or any of them, and every or any other power or authority to them reserved, in and by any other deed or indenture, or in any wise enabling them, or either of them in this behalf, they, the said *A B* and *H B* do, and each of them doth by this present deed or instrument, in writing, by both of them sealed and delivered in the presence of and attested by two credible persons whose names are intended to be hereupon indorsed as witnesses attesting the sealing and delivery of these presents by them, the said *A B* and *H B* respectively, direct, limit, and appoint: THAT ALL, that the undivided moiety, or equal half part or share, which they or either of them have or hath power to appoint as aforesaid, of and in all that and those the manor or lordship of, &c. (the parcels), and all and other the manors or lordships, towns, messuages, lands, tenements, rents, and hereditaments, and parts or shares of manors or lordships, towns, messuages, lands, tenements, rents, and hereditaments, in the said counties of and or either of them, over which the said *A B*

And that all real and personal estate acquired by the wife during the coverture shall be enjoyed and disposed of by her as she shall think fit, without being subject to his debts or interference.

And that he will do all acts necessary for confirming these presents as shall be required of him.

And in exercise of their power the father and husband

appoint that the hereditaments

and *H B*, or either of them, have or hath any power enabling them or him in this behalf, together with all and singular houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, dovecots, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, heaths, moors, marshes, wastes, waste-grounds, folds, foldcourses, and liberty of foldage, feedings, parks, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, mulctures, customs, tolls, duties, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, freeboards, ways, waters, watercourses, fishings, fisheries, fowlings, courts-leet, courts-baron, and other courts, view of frank pledge, and all that to view of frank pledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons, and fugitive felons of themselves, outlawed persons, deodands, waifs, estrays, chief-rents, quit-rents, rents-charge, rents-seck, rents of assize, fee farm rents, boons, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the said undivided moiety, or equal half part or share, rectories and advowsons, hereditaments and premises, belonging, or in any wise appertaining, or with the same or any of them respectively, now at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or appurtenant thereto, with their and every of their appurtenances; and the reversion and reversions, remainder and remainders yearly, and other rents, issues, and profits, of all and singular the said undivided moiety, or equal half part or share, rectories and advowsons, hereditaments, and premises hereinbefore appointed, or expressed and intended so to be, shall henceforth go, remain, and be to the uses, upon and for the trusts, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared, and contained of and concerning the same (that is to say), TO THE USE, INTENT, AND PURPOSE, that the said *E F* and *G F*, their heirs and assigns, shall and may, from and immediately after the decease of the said *A B*, if the said *C B* shall then be living, and thenceforth for and during the natural life of the said *C B*, yearly have, receive, and take (and the said *H B*, by force of his interest, doth for himself, his heirs, and assigns, grant and confirm unto them in the event and during the time aforesaid), one annual sum or yearly rent-charge of £500, of lawful money of *Great Britain*, to be

shall remain,

to the use and intent that the wife's brothers shall, after the father's death, if wife be then living,

receive during her life, a rent charge,

yearly issuing, growing, and payable out of and charged and chargeable upon all and singular the said undivided moiety or equal half part or share, rectories and advowsons, hereditaments and premises, hereinbefore appointed or intended so to be, and upon and out of their rights, members and appurtenances, and to be paid to the said *E F* and *G F*, their heirs or assigns, in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by four even and equal quarterly payments on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, without any deduction or abatement whatsoever, out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, or impositions whatsoever, either already taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed, on the said manors or lordships, towns, messuages, lands, tenements, rectories, advowsons, hereditaments, and premises, or any of them, or any part thereof, or on the said annual sum or yearly rent-charge of £500, or any part thereof, or on the said *E F* or *G F*, their heirs, or assigns, or on the said *C B*, or her assigns, or on any other person or persons, for or in respect of the same, by authority of parliament or otherwise howsoever, or for or in respect of any other matter, cause, or thing whatsoever (save and except the property tax), the first quarterly payment of the said annual sum or yearly rent-charge of £500, to be made on such of the said days of payment as shall happen next after the decease of the said *A B*, in the lifetime of the said *C B*: AND to and for this further use, intent, and purpose, that if the said annuity or yearly rent-charge of £500, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the said days or times whereon the said annuity or yearly rent-charge of £500 ought to be paid as aforesaid, then and so often as it shall so happen, it shall and may be lawful to and for the said *E F* and *G F*, their heirs and assigns (and he the said *H B*, by force of his interest, doth give and grant unto them full power and authority) to enter into and distrain upon all or any part of the said hereditaments and premises, hereby charged with the said annuity or yearly rent-charge of £500, and to sell and dispose of the distress and distresses then and there taken, or otherwise to demean therein according to law in like manner as in the case of distresses taken for rent reserved by lease or common demise; TO THE END AND INTENT, that they the said *E F* and *G F*, their heirs and assigns, may be fully paid and satisfied the said

to be charged upon the appointed hereditaments,

to be paid quarterly,

without any deduction.

Powers of distress and entry for enforcing payment of rent-charge when in arrear.

annuity or yearly rent-charge of £500, and every part thereof so in arrear and unpaid as aforesaid, and all costs, charges, and expenses occasioned by the nonpayment of the same: AND ALSO, that in case the said annuity or yearly rent-charge of £500, or any part thereof, shall at any time or times hereafter be in arrear, and unpaid for the space of thirty-one days next after any of the days or times whereon the same ought to be paid as aforesaid, then and from time to time as often as it shall so happen, it shall be lawful to and for the said *E F* and *G F*, their heirs and assigns, to enter into and upon, and to hold all and singular the hereditaments and premises hereby charged with the payment of the said annuity or yearly rent-charge of £500, or any part thereof, and to receive and take the rents, issues, and profits thereof, to and for their own use until they shall therewith and thereby or otherwise be fully paid and satisfied the arrears of the said annuity or yearly rent-charge of £500 and every part thereof, due at the time of such entry, and which shall afterwards accrue or become due during their being in possession of the same premises, together with all such costs, charges, damages, and expenses whatsoever, as they shall sustain by reason of the non-payment thereof, and such possession when taken to be without impeachment of waste: AND FURTHER, that subject, and charged, and chargeable to and with the said annuity or yearly sum of £500, and the powers and remedies hereinbefore provided for securing and enforcing the payment thereof, all the said undivided moiety or equal half part or share, rectories, advowsons, hereditaments, and all and singular other the premises hereinbefore appointed or intended so to be, with their rights, members, and appurtenances, shall go, remain, and be to the use of the said *I K* and *L M*, their executors, administrators, and assigns, for and during, and unto the full end and term of 200 years, to be computed from the day next before the day of the decease of the said *A B*, and thenceforth next ensuing, and fully to be complete and ended, without impeachment of any manner of waste, upon the trusts nevertheless, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, hereinafter expressed, or declared and contained of or concerning the same (that is to say), UPON TRUST, that they the said *I K* and *L M*, and the survivor of them, and the executors, administrators, and assigns, of such survivor, do and shall permit the person or persons for the time being entitled to the said hereditaments in remainder, immediately expectant upon the said term, to

And subject thereto,

that the hereditaments shall remain to the use of trustees for a term of 200 years,

upon trust,

receive and take the rents, issues, and profits, of the said hereditaments and premises, until the said annuity, yearly rent, or sum of £500, or some part thereof, shall be in arrear or unpaid by the space of forty days next after the same ought to be paid as aforesaid; and when, and so often as the said annuity or yearly sum of £500, or any part thereof, shall be in arrear or unpaid by the space of forty days next after the same shall become payable, do and shall, by and out of the rents, issues, and profits, of the said hereditaments and premises, or by demising, leasing, mortgaging, or absolutely selling the same hereditaments and premises respectively, or any part thereof respectively, for all or any part of the same term of 200 years, or by bringing any action or actions against the tenants or occupiers of the same hereditaments and premises, for recovering the rents, issues, and profits thereof, or of any part or parts thereof, or by all the ways and means aforesaid, or by such other ways and means as to them or him shall seem meet, levy and raise such sum and sums of money as will be sufficient, or as they shall think it expedient or proper to raise, for paying and satisfying unto the said *E F* and *G F*, their heirs or assigns, the said annuity, yearly rent, or sum of £500, or such part thereof as shall be so in arrear and unpaid, and all costs, charges, and expenses whatsoever, which they the said *E F*, *G F*, *I K*, and *L M*, or any of them, their or any of their heirs, executors, administrators, or assigns, shall or may sustain, expend, or be put unto by reason of the non-payment thereof, or otherwise in execution of the trusts of the said term of 200 years: AND do and shall pay and apply the money so to be levied or raised, or a competent part thereof, in or towards the satisfaction of the said arrears, costs, charges, and expenses accordingly, and the surplus or residue thereof (if any) unto the person or persons so for the time being intitled as aforesaid, to and for his and their own use and benefit: AND it is hereby agreed and declared, between and by the parties to these presents, that the said *E F* and *G F*, their heirs, executors, administrators, and assigns, shall stand seised and possessed of, and interested in the said annual sum or yearly rentcharge of £500, UPON TRUST, that they the said *E F* and *G F*, their heirs and assigns, do and shall from time to time, as and when the said annuity shall be received, pay the same to such person or persons only, and for such intents and purposes only as the said *C B*, notwithstanding her coverture, and as if she was sole and unmarried, and whether covert or sole, shall from

if annuity shall be in arrear by forty days,

to raise the same out of the demised premises,

and all costs, &c.

The annuity to be paid to such person as wife, by any writing under

her hand, shall appoint, but not in the way of anticipation.

time to time by any writing or writings signed by her with her own hand, but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise, in the way of *anticipation*, direct or appoint; AND in default of such direction or

And in default of appointment, into wife's proper hands for her separate use.

appointment, into the proper hands of her the said *C B*, for her sole and separate use, exclusively of the said *H B*, who is not to intermeddle therewith, nor is the same to be subject to his control, debts, contracts, forfeitures, disposals or engagements, and the receipts and discharges of the said *C B*, and of such person or persons as she shall from time to time direct or appoint to receive all or any part of the said annual sum of £500 shall be, notwithstanding her coverture, effectual discharges to the person or persons paying the same for the money therein expressed or acknowledged to be received: PROVIDED ALWAYS that when the trusts hereinbefore declared of the said term of 200 years shall have been performed, or have become unnecessary, or incapable of taking effect, and all costs and charges occasioned by the trusts of the said term of 200 years shall be paid (and which costs and charges the said *I K* and *L M*, and the survivor of them, and the executors, administrators, or assigns of such survivor, are and is hereby authorised to levy and raise by the ways and means aforesaid, or any of them) then and immediately thereupon the said term of 200 years shall (subject and without prejudice to any sale or mortgage or other disposition which shall have been made in pursuance of the trusts aforesaid) cease, determine and become utterly void to all intents and purposes whatsoever: PROVIDED ALWAYS, and it is hereby declared that the provision hereinbefore, and by the said bond of even date herewith made for the said *C B* shall be, and she doth hereby accept the same in lieu of all dower and freebench to which at the common law by custom or otherwise she may, or otherwise might be intitled, out of any lands of which the said *H B* hath been, or is, or during the said coverture, may be seised: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and further performance of the said agreement on the part of the said *H B*, he the said *H B* doth for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F* and *G F*, their heirs and assigns respectively, by these presents, that he the said *H B*, his heirs, executors, or administrators shall and will after the decease of the said *A B*, if the said *C B* shall survive him, from time to time, and at all times thereafter during the life of the said *C B*, well and truly pay or cause to

The receipts of wife or of her appointees to be sufficient discharges.

Proviso that when the trusts of the term are performed the term shall cease.

Agreement that wife accepts the provision in bar of dower.

Covenant by husband for payment of the annuity.

be paid unto the said *E F* and *G F*, their heirs and assigns, the said annuity or yearly sum of £500, so granted and secured respectively to them as aforesaid, in trust and for the benefit of the said *C B*, as hereinbefore is mentioned, in the parts, shares, and proportions, and on or at the days or times hereinbefore appointed for the payment thereof, without any deduction or abatement whatsoever (except as aforesaid), and according to the true intent and meaning of these presents: AND the said *A B* and *H B* do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F* and *G F*, their heirs and assigns, so far as relates to the right to appoint and charge the said annuity of £500, quiet enjoyment, freedom from incumbrances, and further assurance of the same, and (as a separate covenant) with and to the said *I K* and *L M*, their executors, administrators, and assigns, so far as relates to the right to appoint, quiet enjoyment, freedom from all incumbrances, and further assurance of the said term of 200 years by these presents, in manner following, (that is to say) that they, the said *A B* and *H B* now have in themselves respectively good right, full power, and lawful and absolute authority to limit, appoint, and charge the said annuity, yearly rent, or sum of £500, and the said powers and remedies for recovering and compelling payment thereof as aforesaid, upon all and singular the said hereditaments and premises hereinbefore mentioned; and also to limit, appoint, and assure the said hereditaments and premises unto the said *I K* and *L M*, their executors, administrators, and assigns for and during the said term of 200 years in manner aforesaid, and according to the true intent and meaning of these presents: AND that all and singular the hereditaments and premises shall continue and be charged with and subject to the said annuity, yearly rent, or sum of £500, and subject and liable to the distress or distresses, entry and entries of the said *E F* and *G F*, their heirs and assigns, for the recovery of the same, and for all costs, charges, and expenses to be occasioned by the nonpayment thereof, and shall or may be held, possessed, occupied, and enjoyed by the said *I K* and *L M*, their executors, administrators, and assigns for the said term of 200 years in manner aforesaid, and according to the true intent and meaning of these presents: AND that respectively free and clear or freely and clearly and absolutely exonerated and for ever discharged, or otherwise by the said *A B*

Covenants by the father and husband.

That they have good right to limit, appoint, and charge the annuity and the powers, and remedies for recovery thereof upon the hereditaments.

And to limit the same for the term of 200 years.

And that the hereditaments shall continue charged with the rent charge.

Liable to the power of distress and entry.

Free from incumbrances.

and *H B*, their heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all charges and incumbrances whatsoever: AND FURTHER that they the said *A B* and *H B* and their respective heirs, and all and every the person and persons whomsoever, having or claiming or who shall or may at any time or times hereafter have or claim any estate, right, title, or interest, legal or equitable, in, to, or out of the said hereditaments and premises hereby charged and limited and appointed as aforesaid, shall and will at any time or times hereafter, upon every reasonable request of the said *E F* and *G F*, their heirs or assigns, but at the proper costs and charges of the said *A B* and *H B*, their heirs, executors, or administrators, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other lawful and reasonable acts, deeds, matters and things whatsoever, for the further, better and more effectually charging the said manors, messuages, tenements, hereditaments and premises, with the said annuity, yearly rent, or sum of £500, and with such powers and remedies for recovering and enforcing payment thereof as aforesaid: AND ALSO for the further, better and more effectually limiting, appointing, conveying and assigning the said manors, hereditaments and premises unto the said *I K* and *L M*, their executors, administrators, and assigns for the residue which shall be then to come and unexpired of the said term of 200 years, according to the true intent and meaning of these presents, as by the said *E F* and *G F*, their heirs or assigns, or any of the parties interested in the premises, or their or any of their counsel in the law shall be reasonably advised or devised and required: AND THIS INDENTURE LASTLY WITNESSETH that in pursuance and performance of the aforesaid agreement in this behalf, and in consideration of the premises, they the said *E F* and *G F* do hereby for themselves jointly and severally, and for their several and respective heirs, executors and administrators, covenant, promise and agree with and to the said *H B*, his heirs, executors, and administrators in manner following (that is to say) THAT she the said *C B*, her executors, administrators and assigns, shall and will from time to time, and at all times hereafter well and sufficiently save, defend, keep harmless, and indemnified the said *H B*, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of, from or against the debt or debts, sum or sums of money which the said *C B* hath already

And for further assurance.

Covenant by wife's trustees to indemnify husband against her debts.

contracted, or shall or may at any time or times hereafter during the said separation contract with any person or persons whomsoever, and every part thereof; AND of, from and against all such costs, charges, damages and expenses as shall or may be recovered against or be sustained or expended or become payable by him, them or any of them, on account or in respect thereof, or by reason of any act or default already committed, done or suffered by the said *C B.* IN WITNESS, &c.

No. XX.

Deed of Separation between Husband and Wife (*a*).

Parties.

THIS INDENTURE made the day of in the year of our Lord 1818, BETWEEN *A B* of of the first part, *C B* of (the wife of the said *A B*, but now living separate and apart from him, with *E F* of her brother) of the second part, and the said *E F* of the third part: WHEREAS

Recites that husband and wife have agreed to live separate.

unhappy differences have arisen and do still subsist between the said *A B* and *C B*, and by reason of the same they have agreed to live separate and apart from each other, and the said *A B* hath agreed to allow and pay the said *C B* one annuity or clear yearly sum of £80, as and for her separate maintenance and support during the joint lives of herself and the said *A B*, (subject nevertheless to the proviso hereinafter contained), and the said *E F* hath agreed to enter into the covenant hereinafter contained: NOW THIS INDENTURE WITNESSETH that in pursuance and performance of the said agreement in this behalf he the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his heirs, executors, and administrators in manner following, (that is to say), THAT the said *C B* may from time to time and at all times hereafter, live separate and apart from the said *A B*, her husband, as if she were sole and unmarried: AND THAT she shall be free from the power and command, restraint, control, authority, and government of him the said *A B*, and shall and may live and reside in such place or places and in such manner as to her shall from time to time seem meet: AND THAT he the said *A B* shall not nor will molest or disturb the said *C B* in her person, or in her manner of living, nor at any time or times hereafter require, or by any means whatsoever, either by ecclesiastical censure, or by taking out citation or process, or by commencing or instituting any suit whatsoever, seek or endeavour to compel her the said *C B* to cohabit or live with him the said *A B*, or to compel any restitution of conjugal rights, nor shall or will for that purpose or otherwise

Husband covenants with wife's brother,

that the wife may live separate,

free from his control,

and that he will not molest her nor require her to cohabit with him.

(*a*) See the precedent of a more special deed of separation, ante No. 19.

use any force, violence, or restraint to the person of the said *C B*, or sue or cause to be sued any person or persons whomsoever for receiving, harbouring, lodging, protecting, or entertaining her: but that she the said *C B* may in all things live as if she were sole and unmarried, without the restraint or correction of the said *A B*, or of any other person or persons by or through his means, consent, or procurement: AND FURTHER that he the said *A B* shall and will yearly and every year during the joint lives of him the said *A B* and *C B* well and truly pay or cause to be paid into the proper hands of the said *C B*, to and for her own sole and separate use and benefit, or to such person or persons as she, in writing, signed with her proper hand, shall from time to time, notwithstanding her coverture, direct or appoint, one clear annuity or yearly sum of £80 by four even and equal quarterly payments, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, without any abatement or deduction whatsoever, the first payment thereof to begin and be made on the 25th day of *March* now next ensuing: AND THAT it shall and may be lawful to and for the said *C B* by her will, or any codicil or codicils thereto, or by any writing in the nature of a will, codicil, or codicils to dispose of all savings of the said annuity in such manner as she shall think proper: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and to be the true intent and meaning of these presents, that so long as the said *C B* shall live and reside with the said *E F*, the said annuity or yearly sum of £80 shall be paid to the said *E F* at the times and in manner aforesaid, in trust for the said *C B*, and that the receipt of the said *E F*, signed with his own proper hand, shall be a good and sufficient discharge for so much of the said annuity or yearly sum of £80 as shall be therein acknowledged or expressed to be received; and the said *E F* shall not nor will be answerable for any misapplication thereof: AND THIS INDENTURE ALSO WITNESSETH that for and in consideration of the covenants and agreements hereinbefore contained on the part and behalf of the said *A B*, AND ALSO for and in consideration of the sum of £20 of lawful money of *Great Britain*, by the said *A B* to the said *E F*, in hand well and truly paid at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) he the said *E F*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said *A B*, his

That he will pay an annuity to the wife or her order,

and that she may by will or otherwise dispose of the savings.

Proviso, that so long as wife resides with her brother the annuity shall be paid to him in trust for her,

and that the receipt of the brother shall be a good discharge.

Wife's brother covenants with husband

that she will not require husband to live with her, nor to allow her more than the said annuity,

executors and administrators, by these presents in manner following, (that is to say), that the said *C B* shall not at any time hereafter molest or disturb the said *A B*, or require or by any means whatsoever, either by ecclesiastical censure or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner endeavour to compel him the said *A B* to cohabit or live with her, or to compel any restitution of conjugal rights, nor seek for or require, or by any means whatsoever endeavour to compel the said *A B* to allow her more, or any further or greater, or other alimony or maintenance than the said clear annuity or

and will indemnify husband against wife's debts,

yearly sum of £80: AND FURTHER that he the said *E F*, his heirs, executors, or administrators, shall and will from time to time and at all times hereafter well and sufficiently save, defend, keep harmless, and indemnified the said *A B*, his heirs, executors, and administrators, and his and their real and personal estates, of, from, and against all and every the debt and debts which the said *C B* already hath contracted, or shall or may at any time or times hereafter during the said separation contract with any person or persons whomsoever, and every

and from all actions.

part thereof, and of and from all actions, suits, claims, and demands whatsoever, on account thereof, and of, from, and against all such costs, charges, losses, damages, and expenses as shall or may be recovered against, or sustained, expended, or become payable by him, them, or any of them on account or in respect thereof, or by reason of any act or default already

Proviso that if husband and wife shall hereafter consent to live together the annuity shall cease and the covenants be void.

committed, done, or suffered by the said *C B*: PROVIDED ALWAYS, and it is hereby agreed and declared to be the true intent and meaning of these presents, and of the said parties, that in case the said *A B* and *C B* shall at any time hereafter with their mutual consent come together and cohabit as man and wife, that then and in such case and from thenceforth the said annuity or yearly sum of £80, hereinbefore covenanted and agreed to be paid, shall cease and be no longer payable, and from thenceforth all the covenants and agreements hereinbefore contained, on the part and behalf of the said *E F*, shall become absolutely null and void to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. IN WITNESS, &c.

ADDENDA.

No. I.

On the Law relative to the Solemnization of Matrimony.

PREVIOUSLY to the Marriage Act (*a*), the legal validity of marriages depended upon the doctrines of the Ecclesiastical Courts. Some former statutes (*b*) had inflicted penalties upon parties concerned in the celebration of clandestine marriages, but without venturing to control the rules which the church had established with reference to their validity. An opinion was commonly entertained that matrimony, ordained and regulated by the divine law, was not to be treated as a human institution, and was not a proper subject for the interference of the civil legislature. This opinion formed one of the principal grounds upon which the new principle of nullity of marriage, introduced by the Marriage Act, was opposed.

(*a*) 26 Geo. II. chap. 33. It is said, that at the time when this act was introduced, the attention of the Legislature had been particularly drawn to the subject, by a case which came before the House of Lords in its judicial capacity. The case seems to have been that of Cochran v. Campbell, an appeal from Scotland, noticed in the opinions given in Dalrymple v. Dalrymple, 2 Hagg. 105. 125. That case was decided by the House of Lords on the 31st of Jan. 1753, and on the same day it was ordered that the judges should prepare a bill for the better preventing clandestine marriages. Lords' Journals, vol. xxviii. p. 14. But although the example which this case furnished of the effects of the Scotch law of marriage was probably the immediate occasion of the measure, it was confined to England. Some alteration in the law of Scotland was however contemplated at the time; after the bill had been committed, it was ordered that the Lords of Session in Scotland should prepare a bill for the more effectually preventing clandestine marriages in that part of the kingdom. Lords' Journals, vol. xxviii. p. 98.

(*b*) 6 and 7 Will. III. chap. 6, sec. 52. 7 and 8 Will. III. chap. 35. sec. 2, 3, 4. 10 Anne, chap. 19, sec. 176.

That statute also effected another important alteration in the law of marriage, by the clause (*a*) enacting that no suit or proceeding should be had in any Ecclesiastical Court, to compel a celebration of marriage in *facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de præsenti*, or *per verba de futuro* (*b*). Before the passing of this statute, the Spiritual Courts possessed the power of decreeing the performance of a contract of matrimony; and as such a contract was thus capable of being enforced, it had for some purposes the effects of marriage.

In later times the attention of the Courts has seldom been called to the distinctions which previously prevailed upon this subject, and expressions have sometimes been used, which seem to imply an opinion that a matrimonial contract, unattended with any religious ceremony, was before the alteration of the law equivalent to a marriage legally solemnized (*c*). This opinion is understood to have been explicitly advanced in a recent case (*d*). Upon the trial of an issue out of the Court of Chancery, on the legitimacy of a person born before the Marriage Act, the Lord Chief Justice of the King's Bench is said to have ruled, that at that period a contract of matrimony *per verba de præsenti* constituted a legal marriage. On a motion for a new trial, the question was elaborately argued before the Lord Chancellor, but did not ultimately call for a decision.

The question, though not one of frequent occurence in England, is still of considerable importance with reference to marriages in Ireland and the colonies, and to marriages amongst the two sects which are excepted from the operation of the Marriage Act. It may not, therefore, be useless to devote a few pages to the discussion of this point.

Matrimonial contracts, or spousals, were divided into contracts *per verba de futuro*, and contracts *per verba de præsenti*:

(*a*) Sec. 13.

(*b*) This clause was brought into its present shape by amendments made in the Committee of the House of Commons: the word *contract* was inserted instead of precontract, as it previously stood; and the words, "whether *per verba de præsenti*, or *per verba de futuro*, which shall be entered into," &c. were added. Commons' Journals, vol. xxvi. p. 835. The words "nor to any marriages solemnized beyond the seas," in the last section, were also added by the Commons. Ibid.

(*c*) See 8 Taunt. 837. 2 Hagg. 64. 1 Dow. 181. (*d*) Beer v. Ward.

and contracts of the former description, when followed by carnal intercourse, were commonly considered equivalent in legal effect to contracts *per verba de præsenti* (*a*). Contracts *per verba de futuro*, without consummation, might be released by mutual consent; and it appears that the Spiritual Courts had not the power of effectually enforcing them (*b*). But a present contract, or a future contract *cum copulâ*, could be carried into effect by those Courts. It was held not to be releasable, and formed a ground for avoiding a subsequent marriage with another person. In these respects the consequences of a matrimonial contract corresponded with those of marriage, but an examination of the authorities will show it to have been settled from a very early period, that until the contract was sanctioned by a religious ceremony, performed by a person in holy orders, it was incomplete; that it was not held to constitute lawful matrimony, and that it did not confer the civil rights incident to that state.

At one period, it seems to have been held that a scrupulous observance of the prescribed forms in the solemnization of matrimony was essential. In Fitzherbert's Nat. Brev. (*c*), it is said that a woman married in a chamber shall not have dower by the common law. "Quære of marriages made in chapels not consecrated, for many are by licence of the bishops married in chapels, &c.: and it seemeth reasonable, that in such cases she shall have dower." So in Foxcroft's case (*d*), a man shortly before his death, and while infirm, and in his bed, was privately married to a woman then enceint by him; the marriage was performed by the bishop, but without the celebration of any mass: it was held to be void, and the issue adjudged a bastard. A similar case is mentioned as having occurred in 10 Edward IV. (*e*)

But the strictness of these rules was relaxed, and it was afterwards generally agreed, that the ministration of a priest alone was sufficient to give the contract the essentials of a marriage in *facie ecclesiæ*, and to confer the privileges of lawful matrimony. Thus it is laid down, that if a man and woman are married by a priest in a place which is not a church or

(*a*) See 2 Hagg. 66. (*b*) 2 Burn. Eccl. Law, 457. Swinburne on Spousals, p. 232, edition of 1686. (*c*) 150, N. (*d*) 10 Ed. I. 4 Vin. Ab. 218, pl. 18. (*e*) 4 Vin. Ab. 38, pl. 21. See also stat. 25 Hen. VIII. ch. 21. cited post.

chapel, and without any solemnity of the celebration of mass, yet it is a good marriage, and they are baron and feme (*a*).

In Weld v. Chamberlayne (*b*), the marriage was by a priest, but a ring was not used according to the book of common prayer. It was doubted whether this informality might not vitiate the marriage, and a case was ordered to be made upon the point; but the Chief Justice Pemberton inclined to think it a good marriage, there being words of contract *de præsenti*, repeated after a parson in orders.

In the case of Holder v. Dickenson (*c*), on a motion in arrest of judgment in an action by a woman for a breach of promise of marriage, Vaughan's opinion was against the plaintiff; and one of his reasons was, that a priest was requisite to the marriage, and that she ought therefore to have averred in the declaration, "*quod obtulit se*, in the presence of a parson." The other judges differed from Vaughan, not as to the necessity of the intervention of a priest, but as to the necessity of introducing such an allegation into the declaration.

It is laid down by Perkins (*d*), that if a man make a contract of matrimony with J. S. and die before the marriage solemnized between them, she shall not have dower, for she never was his wife. So also he says, that after a contract of matrimony between a man and woman, yet one may enfeoff the other, for they are not one person in law; and if the woman dieth before the marriage solemnized, the man shall not have her goods as her husband (*e*). "And," he says, "it hath been holden, that if a man contract himself unto a woman, *et postea cognovit eam carnaliter*, and afterwards he doth enfeoff the same woman of a carve of land, and puts her in seisin thereof, and afterwards marrieth her in *facie ecclesiæ*, that this feoffment is void, because that it is made *post fidem datam, et carnalem copulam, et sic tanquam inter virum et uxorem*; for that the marriage is subsequent, &c. But at this day, if such a feoffment be made, it is good enough. But after the marriage celebrated between a man and a woman, the man cannot enfeoff his wife, for then they are as one person in law." It is to be observed, that the case here put is that of a contract *cum copulâ*, which, it is agreed, was of the same legal effect as a

(*a*) 4 Vin. Ab. 38, pl. 21. And see Perk. 306. Tarry v. Browne, 1 Sid. 64. Wood's Institutes, p. 59. (*b*) 2 Show, 300. (*c*) 1 Freem. 95. Carter, 233. 3 Keb. 148. (*d*) Sec. 306. (*e*) Sec. 194.

contract expressly *per verba de præsenti*. The earlier case referred to, in which it had been held that the feoffment made after the contract was avoided if the parties intermarried, was probably founded on the notion that the subsequent marriage had relation back to the time of the contract; a notion which was entertained by the civilians, and which was applied by them to legitimate children born before the marriage of their parents.

In Lord Hale's notes to Co. Litt. (*a*), the following case is given: "*A* contracts *per verba de præsenti* with *B*, and has issue by her, and afterwards marries *C in facie ecclesiæ*. *B* recovers *A* for her husband, by sentence of the ordinary, and for not performing the sentence he is excommunicated; and afterwards enfeoffs *D*, and then marries *B*, *in facie ecclesiæ*, and dies. She brings dower, and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage; *sed reversatur coram rege et concilio quia prædictus A non fuit seisitus*, during the espousals between him and *B*." Lord Hale adds, "*Nota*, neither the contract nor the sentence was a marriage."

In Bunting v. Lepingwel (*b*), *A* contracted matrimony with a woman *per verba de præsenti*. She afterwards married *B*, and *A* then libelled against her upon the contract in the spiritual court; it was decreed that she should marry *A*, and her marriage with *B* was declared null: she accordingly married *A*, and had issue by him. The question was, whether the plaintiff, one of the issue of this marriage, was legitimate; and it was adjudged in his favour. The objection was, that *B* was not a party to the suit in the spiritual court; and that the marriage with him having been solemnized in church, was voidable only, and not void; and that it could not be dissolved, except by a sentence in a suit for that purpose, in which he should have been cited. The civilian who argued on the other side, contended that by reason of the precontract the marriage with *B* was *quasi* null: after the contract, he said, the parties became baron and feme by the civil law, and their issue born after the contract, and before marriage, were legitimate if a marriage followed; if not, he admitted that issue born after the contract were illegitimate: and when the marriage followed, it had relation to the contract, and rendered an inter-

(*a*) 33 a, note 10. (*b*) Moor, 169. 4 Co. 29.

mediate marriage void and adulterous: and by this relation, he contended that the marriage with *A* was sufficient to avoid the intermediate marriage with *B*, even without a sentence: he also relied upon the effect of the sentence; and according to Lord Coke, the case was decided upon the ground that credit must be given to that sentence, as being on a matter peculiarly belonging to the cognizance of the Court which pronounced it. In this case, it was admitted that the contract did not render the subsequent marriage with another *ipso facto* void; though it was said that such marriage became void upon the contracting parties afterwards intermarrying: and it seems to have been always well settled, that a precontract was one of those impediments which rendered the marriage voidable only, and not *ipso facto* void; and which, on that account, could only be taken advantage of during the lives of the parties (*a*). On the other hand, it was always well settled, that a marriage with one person, actually solemnised, rendered a subsequent marriage with another absolutely void.

The position that issue born after a contract *per verba de præsenti* are illegitimate, if the parents do not subsequently marry, was admitted in the above case of Bunting v. Lepingwel; and the doctrine of relation, by which the civil law gave a retrospective effect to the marriage as to questions of legitimacy, was not admitted by the common law. So, according to Godolphin, a child born before marriage celebrated between the father and mother is called a bastard by the common law (*b*); and when the question of general bastardy was referred to the ordinary, the matter to be tried by him was, whether the party was born in lawful matrimony (*c*); the same expression which was used in cases of dower: it follows, that the same species of marriage was required to confer the rights of legitimacy as to confer the right of dower.

In Paine's case (*d*), it was said in argument, that on a sentence for dissolution of a marriage, on the ground of precontract, the parties contracted became husband and wife by the sentence without further solemnity; and an opinion given by

(*a*) Co. Litt. 33 a. 6 Co. 66 b. See Hemming v. Price, 12 Mod. 432. 419; and Blackst. Comm. vol. i. p. 434. (*b*) *Repertorium Canonicum*, chap. xxv. pl. 2. (*c*) Ibid. pl. 6. Ayliffe's Parergon, p. 109, edit. of 1726. So Glanville says, "*Hæres autem legitimus, nullus bastardus nec aliquis qui ex legitimo matrimonio non est procreatus, esse potest.*" Lib. 7, ch. 13. (*d*) 1 Sid. 13.

Noy, in a reading to that effect (*a*), was cited: but Twisden denied this, and said that the marriage must be solemnized before they could be completely baron and feme.

In Heydon v. Gould (*b*), letters of administration of the wife's effects were granted to the husband: the next of kin sued for a repeal, suggesting that there had been no marriage. The parties were Sabbatarians, and had been married by one of their ministers, using the form of the common prayer except the ring, and they had cohabited till the woman's death. It appeared, however, that the minister was a mere layman, and not in orders; upon which the letters of administration were repealed. Upon appeal this decision was affirmed by the delegates. The reason was said to be, that the man demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case; and that though perhaps the wife, who was the weaker sex, or the issue, who were in no fault, might entitle themselves by such marriage to a temporal right, yet the husband himself, who was in fault, should never entitle himself by the mere reputation of a marriage without right. It was argued, that this marriage was not a mere nullity; that the contract was sufficient by the law of nature; and that though the positive law ordained that marriage should be by a priest, that made such a marriage as this irregular only; but that it was not void, unless the positive law had gone on and ordained expressly that it should be so. This argument, however, was overruled; and a case in Swinburne, where such a marriage had been ruled void, and the act of Parliament for confirming the marriages during the usurpation, were referred to; and it was said that the form of pleading marriage was *per presbyterum sacris ordinibus constitutum.*

In this case it was clear that the ceremony amounted at least to a contract *per verba de præsenti*, yet it was held not to confer the civil rights of a husband. This case was mentioned, in a recent judgment of Sir John Nicholl's, as one in which the marriage, not being celebrated by a priest, was held to be a mere nullity (*c*). Sir W. Wynne observed on it, that the marriage was one according to their own invention, and the Prerogative Court refused to acknowledge it (*d*).

(*a*) Dyer, 105 b, note. (*b*) 1 Salk. 119. 2 Burn. Eccl. Law, 472.
(*c*) 2 Phill. 21. (*d*) 1 Hagg. App. 8.

In Hervey v. Hervey (*a*), in a suit for jactitation of marriage, evidence was given that the parties had for eighteen years lived together, acknowledging each other, and being received as husband and wife. The Chancellor of London, notwithstanding this evidence, thought himself bound by the rules of the ecclesiastical law to pronounce against the marriage: the canons (he said) not allowing a marriage to be proved *inter vivos*, by mere circumstantial evidence. His sentence was affirmed by the dean of the Arches. On appeal to the delegates, they decided differently, holding, that after such deliberate acknowledgement and avowal on the part of the husband of the truth of the marriage he could not be permitted to impeach it. In this case the question on which the Courts differed was, whether the marriage could be proved by evidence of this nature? It is obvious that this question could not have arisen if it had been supposed that a mere verbal contract could constitute a marriage: on that supposition, there could have been no doubt that an acknowledgement of the existence of the relation of husband and wife must be taken as direct evidence of a present contract, in the same manner as in the Scotch law (*b*).

The judgment of Sir E. Simpson, in Scrimshire v. Scrimshire (*c*), a case relative to the validity of a marriage celebrated abroad, which occurred shortly before the Marriage Act, forcibly illustrates the doctrine at that time adopted by the ecclesiastical courts. The marriage in question had been solemnized by a Roman Catholic priest according to the Roman ritual: the learned judge doubted whether even this species of marriage would be deemed perfect if it had taken place in England. He said, that "as a priest popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a popish priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a priest: but upon what foundation a marriage after the popish ritual can be deemed a legal marriage is hard to say. Indeed the canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnization, according to English rites; but that contract, or *ipsum matrimonium*, does not convey a legal right to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the

(*a*) 2 W. Bl. 877. (*b*) See M'Adam v. Walker, 1 Dow. 148.
(*c*) 2 Hagg. 395.

English ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract that is considered by the canon law as *ipsum matrimonium* (*a*)?" He then refers to a case in Ireland, where a marriage by a Roman Catholic priest, according to the popish ritual, had been held valid, and questions the decision. "I apprehend, unless persons in England are married according to the rites of the church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, &c. How can a bishop try or certify such a marriage? Can he certify that English subjects, residing in England, were lawfully married according to the laws of England, if they were not married according to the rites prescribed by act of parliament for marriages in this country? Would a contract only, by the intervention of a Romish priest or any priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract (*b*)." He afterwards remarks, that in the case before him there was "a fact of marriage by the intervention of a priest; without which, undoubtedly, by our law it could only be a contract (*c*)."

The doubt here expressed on the question, whether the use of the established ritual be essential, appears to have been set at rest by other authorities, particularly by those relating to Roman Catholic marriages in Ireland and in England before the Marriage Act; but the reasoning of the learned judge is important as showing that the necessity of the intervention of a priest in some form was a point then considered to be free from any doubt, and as pointing out the material difference in the view of the Ecclesiastical law, between a marriage solemnized by a priest, and a contract which, though said to be *ipsum matrimonium*, was not then supposed to confer the civil rights of property or the power of suing in the ecclesiastical courts for restitution of conjugal rights. It explains the meaning of the expression *ipsum matrimonium*, as applied to a contract, and shows that that expression did not imply that such contracts possessed the qualities, or produced the consequences, attending a marriage duly solemnized. It was taken to be clear that a contract without solemnization was not a legal marriage;

(*a*) 2 Hagg. 400. (*b*) Ibid. 402. (*c*) Ibid. 404.

the only doubt was, whether it was essential that one particular form of solemnization should be followed.

In a case (*a*) which occurred before Lord Stowell, in the year 1820, his Lordship observed that it was a generally accredited opinion that if a marriage was had by the ministration of a person in the church, who was ostensibly in holy orders, and was not known by the parties to be otherwise, such marriage should be supported: parties who came to be married were not expected to ask for a sight of the minister's letters of orders; and if they saw them, they could not be expected to inquire into the authenticity. The case put supposed the general rule to be, that the intervention of a priest is a matter of necessity: and if this was the rule at that time, it must have been equally so before the marriage act of 26 Geo. II.; for there was nothing in that act which could be construed to be introductive of any new rule on this point: the direction that the solemnization shall be according to the rubric is not enforced by the clause of nullity. The only grounds of nullity of marriage introduced by that act, were the want of a license duly obtained, or of publication of banns, or the solemnization not taking place in a church or chapel: the circumstance of the ceremony not being performed by a person in holy orders is not made a ground of nullity: the other clauses of the act are only directory, the non-observance of them not affecting the validity of the marriage.

In cases of matrimonial contracts, it was the practice of the Ecclesiastical Courts, till their power of entertaining suits founded on such contracts was taken away, to decree the party defendant to solemnize the marriage *in facie ecclesiæ* (*b*), a practice which shows that the marriage was not considered to be complete for all purposes until the ceremony was performed. On the other hand, where the marriage had once been solemnized by a priest, whatever circumstances of irregularity or clandestinity might have attended it, no idea seems to have been entertained of requiring the ceremony to be reiterated. Ecclesiastical censures or other penalties might be incurred (*c*), but the marriage was deemed to be complete.

It appears from the judgment in Scrimshire v. Scrimshire (*d*),

(*a*) Hawke v. Corri, 2 Hagg. 280. 288. (*b*) Oughton Tit. 209, *et seq.* 2 Hagg. 82. (*c*) See Middleton v. Crofts, 2 Atk. 650. Cas. Temp. Hard. 57. More v. More, 2 Atk. 157. (*d*) See also Green v. Green, cited, 1 Hagg. Appendix 9, note; and Oughton Tit. 193.

before referred to, that when the matter rested in contract only, it could not be made the foundation of a suit for restitution of conjugal rights, and the ceremony was therefore essential to confer the chief privileges of marriage. From other authorities, it seems that by the law of the ecclesiastical courts, the cohabitation of parties who had entered into a matrimonial contract was not permitted until the solemnization *in facie ecclesiæ:* and intercourse between them in the mean time was punishable by ecclesiastical censures (*a*): it was said indeed to be punished not as fornication, but as a contempt of the laws of the church.

The text writers, who have considered this subject, agree in the necessity of a solemnization to confer the civil rights of marriage. Swinburne lays it down, that spousals *de præsenti*, without solemnization, do not according to the law of England render the issue legitimate, or give to the wife the right of dower, or to the husband the right of property in the wife's goods, or of administrating to her (*b*). The same doctrine is stated by Ayliffe (*c*), and in Bacon's Abridgment (*d*).

So Dr. Burn says, that if the temporal courts write to the bishop to certify whether accoupled in lawful matrimony or not, it seems that the bishop would certify that persons not married according to the forms of the church of England as by law established, were not accoupled in lawful matrimony; and that if a person applies to the spiritual court for any benefit by the ecclesiastical law in virtue of a precedent marriage, it seems that he ought to entitle himself according to that law (*e*). In Shepherd's Epitome, it is laid down that marriage is not accounted consummate by our law till it be celebrated and solemnized in *facie ecclesiæ* (*f*), and that the woman, when espoused or contracted, is not reputed a *feme covert* till married in *facie ecclesiæ* (*g*).

A more recent writer, treating of the law of Ireland (*h*), con-

(*a*) See More, 170. 6 Mod. 155. 3 Lev. 376. Irish statute 11 Geo. II. chap. 10, sec. 3, cited *post*. (*b*) P. 2. 15. 234. 235. (*c*) Paregon, p. 245. (*d*) Tit. Marriage, C. (*e*) Ecclesiastical Law, 1st Ed. 1763, vol. 2, p. 29. (*f*) P. 720. (*g*) P. 722.

(*h*) The general matrimonial law of Ireland is the same as that of England, except so far as changes have been introduced by the difference between the statute law of the two countries. Sec. 1, Addams, 65. The English Marriage Act was not extended to Ireland; but by the Irish statute 9 Geo. II. chap. 11, marriages and matrimonial contracts of minors,

siders the intervention of a person in orders as necessary to constitute a legal marriage with reference to civil rights (*a*). He puts the case of a marriage celebrated by a layman disguised as a clergyman; in which, he says, it seems that a solemnization in *facie ecclesiæ* should be decreed, because, though not properly a marriage, it is a contract *de præsenti* (*b*).

In a late case in the Arches Court, where the matrimonial law of Ireland came in question, the evidence speaks of solemnization by a priest as one of the essentials to a legal marriage (*c*).

The different statutes relating to the subject of marriage concur in showing, more or less pointedly, that this view of the essential distinction between perfect marriages and mere contracts has uniformly prevailed.

When the statute 25 Hen. VIII. chap. 21, transferred to the Archbishop of Canterbury the power of granting those licenses and dispensations which had previously been obtained from Rome, it was thought necessary to enact that children procreated after solemnization of marriage by virtue of such licenses or dispensations, should be deemed legitimate in all Courts, as well spiritual as temporal, and should be capable of inheriting. This clause must have been founded upon an opinion, that a compliance with all the canonical regulations might be indispensable.

The statute 32 Hen. VIII. ch. 38, "for marriages to stand notwithstanding precontracts," distinguishes in its language between contracts and marriages, speaking of the latter as the

without proper consent, may be annulled by the ecclesiastical courts, if either of the parties be entitled to a real estate of 100*l.* per annum, or personal estate of the value of 500*l.*; or if the father or mother of the minor be in possession of real estate of 100*l.* per annum, or personal estate of the value of 2000*l.*; and provided that a suit be commenced within a year by the father or guardian of the minor, and prosecuted with effect. The Irish statute 12 Geo. I. chap. 3, enacted, that a marriage consummated should not be set aside on the ground of a pre-contract without consummation: the power of enforcing matrimonial contracts, with this qualification, subsisted till the statute 58 Geo. III. chap. 81. The other statutes, as to marriages in Ireland by Roman Catholic priests and dissenting ministers, are noticed in the subsequent pages.

(*a*) View of the Civil Law, by Dr. Browne, professor of Civil Law at Dublin, vol. 1, p. 74, 75, 2nd Ed. (*b*) Ibid. p. 53. 54. See Hawke v. Corri, cited *ante*, p. 454, and Rex v. Luffington, Burr. Sett. Cases, 232, cited *post*. (*c*) Bruce v. Burke, 2 Addams, 471.

true matrimony contract and solemnized in the face of the church. In like manner the statute 2 and 3 Edward VI. chap. 23, which repeals this act, empowers the ecclesiastical judges, on proof of a contract of marriage, to give sentence for matrimony, commanding solemnization, cohabitation, &c.

After the restoration of Charles II., it was enacted, by the statute 12 Car. II. chap. 33 (*a*), that marriages, which, during the usurpation, had been solemnized before justices of the peace according to the parliamentary ordinances, should be of the same force and effect as if they had been solemnized according to the rites and ceremonies established or used in the church or kingdom of England. It was provided, that issues on the point of bastardy or lawfulness of marriage, depending on these marriages, should be tried by a jury.

By the act 6 and 7 Will. III. chap. 6, certain duties to be paid on marriage, were granted to the crown for five years. The 63d section enacted, that all persons commonly called quakers, or reputed such, and all papists, or reputed papists, whether they were popish recusant convicts or not, and all Jews, or any other persons, who should cohabit and live together as man and wife, should pay the duties thereby granted, as they ought to have done by virtue of the act if they had been married according to the law of England, to be collected in the same manner. And upon every pretended marriage which should be made by any such persons within the said term of five years, according to the method and forms used amongst them, the man so entering into such pretended state of matrimony was within five days to give notice to the collectors, on pain of forfeiting five pounds. The next section provided, that nothing therein contained should be construed to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as they would have been if the act had never been made.

The 52d section of this act, and the subsequent statute 7 and 8 Will. III. chap. 35, impose penalties on clergymen celebrating marriage without banns or license; and by the 4th section of the last act, the man so married was to forfeit £10. The object of these clauses was the better collection of the duties. The duties, except those upon licenses, appear to have

(*a*) Confirmed by stat. 13 Car. II. chap. 11.

expired previous to the statute 10 Ann. chap. 19, the 176th section of which recites, that great loss had happened to the duties already laid upon stamped vellum, parchment, and paper, and that other inconveniences daily grew from clandestine marriages; and imposes a penalty of £100 on any parson, vicar, curate, or other person in holy orders, celebrating a marriage without banns or license. These clauses apply only to marriages performed by the intervention of clergymen: they would have been nugatory if marriages could have been constituted without that intervention.

The Irish statute 19 Geo. II. chap. 13, declares null marriages performed by popish priests, if the parties, or either of them, be protestant; but if the intervention of the priest was not essential, this statute also would be nugatory in cases where the parties cohabited as husband and wife: the acknowledgment of that relation would, as in Scotland, constitute a legal marriage independently of the ceremony. Yet it does not appear to have been doubted, that in cases within this statute the nullity of the original ceremony was fatal (*a*).

Another Irish statute 11 Geo. II. chap. 10, sec. 3, recites, that several protestants dissenting from the church of Ireland as by law established, scrupling to be married according to the form of ceremony prescribed by the said church, did therefore frequently enter into matrimonial contracts in their own congregations, before their ministers or teachers, and thereupon lived together as husband and wife; and it enacts, that for the ease of such protestant dissenters who had already entered, or should thereafter enter, into such matrimonial contracts, and thereupon live together as husband and wife, that they should not be prosecuted in any ecclesiastical court, *ex officio mero*, or on the presentment of any minister or churchwarden of any parish, for or by reason of their entering into such matrimonial contracts, or for their living together as husband and wife by virtue of such contracts, provided such protestant dissenters, and such minister or teacher, had or should take the oaths and subscribe the declaration according to the statute 6 Geo. I. chap. 5.

It will be observed, that in this act the term matrimonial contracts is carefully adopted in speaking of marriages by dis-

(*a*) See Dowling v. Constable, Irish Term Rep. 259. Steadman v. Powell, 1 Addams, 58. Bruce v. Burke, 2 Addams, 471.

senting ministers; and without affirming or implying their legality, they are only exempted from censure. The immunity thus granted was extended by the statute 21 and 22 Geo. III. chap. 25 (Irish), which recites, that the removing any doubts that might have been entertained concerning the validity of matrimonial contracts or marriages, entered into by protestant dissenters, and solemnized by protestant dissenting ministers or teachers, would tend to the peace and tranquillity of many protestant dissenters and their families; and it then declares and enacts, that all matrimonial contracts or marriages theretofore entered into between protestant dissenters, and solemnized or celebrated by protestant dissenting ministers or teachers, should be, and should be held and taken, to be good and valid to all intents and purposes whatsoever: and that all parties to such marriages, and all persons claiming under them, should in virtue of such marriages be and be deemed, adjudged, and taken as entitled to all rights and benefits whatsoever, from under or in consequence of such marriages, in like manner as if such marriages had been solemnized by a clergyman of the church of Ireland.

A late statute (*a*), for regulating marriages in Newfoundland, begins by reciting that a doubt had arisen whether the law of England requiring religious ceremonies in the celebration of marriage to be performed by persons in holy orders, for the perfect validity of the marriage contract, be in force in Newfoundland: it enacts that marriages in that colony, not performed by clergymen, shall be void (*b*).

The opinion of the necessity of the intervention of a priest recently led to another act, relative to marriages in the British territories in the East Indies. It had been usual for members of the church of Scotland, resident in that country, to be married by ministers of their own church. But presbyterian ministers not receiving episcopal ordination, are not, according to the English law, deemed to be in holy orders; and it had been held that natives of Scotland, resident in India, were to be con-

(*a*) 57 Geo. III. chap. 51.

(*b*) This act was repealed by the statute 5 Geo. IV. chap. 68, which is to continue in force for five years, and by which any teachers or preachers of religion, licensed by the governor or a secretary of state, are empowered to celebrate marriages in the colony, in places, where, by reason of the difficulty of internal communication, it may be inconvenient to attend at a church or chapel of the established church of England.

sidered as having an English domicile (*a*). It therefore became doubtful whether these marriages were not to be governed by the English law, according to which they would have stood upon the same footing as contracts *de præsenti* before the Marriage Act. The statute 58 Geo. III. c. 84, reciting the doubt on this point, confirms the marriages thus celebrated, giving them the same effect as if they had been solemnized by clergymen of the church of England, according to the rites and ceremonies of the church of England.

The general opinion which prevailed in England before the Marriage Act, of the necessity of solemnization by a priest, appears also from the manner in which clandestine marriages were then conducted. It is well known that at that period such marriages were performed by some disreputable members of the clerical profession, who were to be found at the Fleet Prison, May Fair, and some other places. There would, however, have been no reason for procuring, in these cases, the ministration of a clergyman, if the purpose could have been equally well effected by a private contract, which would have been attended with less inconvenience, delay, and expense, and would, at the same time, have evaded the legal penalties. The marriage shops, as they were sometimes termed, would not have been resorted to; and the services of the Fleet parsons, and their runners (*b*), would have been superfluous.

The same opinion pervades the debates in Parliament, on the introduction of the Marriage Act. Lord Mansfield, then Solicitor-General, is represented to have said, "I believe it will be allowed, that if a man and woman seriously and sincerely enter into a marriage contract, without the interposition of a clergyman or any religious ceremony whatever, it will be a good marriage, both by the law of God and the law of nature; yet the law of this society, and, I believe, of every other Christian society, has declared it not to be a good marriage; therefore, why may not we declare those marriages to be void which are solemnised by scandalous, worthless clergymen, in a clandestine manner (*c*)?" Similar ideas were expressed by the other speakers; they agree in ascribing the mischief then complained of to the misconduct of some exceptionable characters amongst

(*a*) Bruce v. Bruce, 6 Bro. P. C. 566, ed. Toml. 2 Bos. and Pull. 229, n. Monroe v. Douglas, 5 Mad. 379. (*b*) See 2 Atk. 158. (*c*) Parliamentary History, vol. 15, p. 78.

the clergy, not alluding to any possibility of effecting a clandestine marriage without their assistance. The act itself appears to have been framed with the same view: it does not nullify contracts *de præsenti*, or declare that they shall not be deemed marriages; the enactment that they should not be enforced, by compelling solemnization, was thought sufficient to take away their effect.

The same view must have led to the late statute (*a*), which, using the same terms as the English Marriage Act, takes away from the Ecclesiastical Courts in Ireland the power of enforcing contracts of marriage *per verba de futuro*, or *per verba de præsenti*. If a contract *de præsenti* was in itself a marriage, without any solemnization, it would be merely nugatory to prevent the solemnization from being enforced.

In the practical application of the ancient law, some distinctions, with reference to the mode of trying and determining the validity of marriages, arose from the different modes in which the question was brought forward, and from the difference of the tribunals before which it came.

There were some few cases in which the issue upon the plea *ne unques accouple*, &c. instead of being referred to the bishop, was tried in the Courts of common law by a jury (*b*); and, with respect to bastardy, there were more extensive exceptions to the general rule, which required a trial by certificate (*c*). In these excepted cases, however, the issue tried by the jury was the same as that which, in general, was referred to the bishop; and it does not appear that there was any difference between the two modes of trial, with reference to the species of marriage necessary to support the issue.

In other cases, the question of marriage came before the courts of common law in a different form, from that in which it presented itself to the ecclesiastical tribunals. The issue to be tried was, whether *A* was married to *B*, or whether *A* was the wife of *B* (*d*); and, in these cases, it was held, that what was termed a marriage *de facto* was sufficient to support the issue: the lawfulness of the marriage did not come in question; and it was not necessary to show, as on the issue of *ne unques*

(*a*) 58 Geo. III. chap. 81. sec. 3. (*b*) 21 Vin. Ab. 44, pl. 17. 21. Cro. Jac. 102. 1 Lev. 41. Ilderton v. Ilderton, 2 H. Bl. 145. (*c*) 21 Vin. Ab. 45. (*d*) Allen v. Gray, 1 Show. 50. Salk. 437. Comb. 131. Norwood v. Stevenson, Andrews, 227. See 1 Lev. 41. Ventr. 77.

accouple, that there had been a marriage *secundum leges ecclesiæ* (*a*). Thus the marriage *de facto* was valid at law, where it came in question in actions not admitting of a plea disputing its lawfulness. This leads to the inquiry into the distinction between a lawful marriage, and that which was termed a marriage *de facto*; and it will be seen from the cases, that the latter phrase was generally applied to marriages which were open to legal objection, not from the want of the requisite solemnities, but from impediments rendering them liable to be dissolved (*b*). Thus marriages which were voidable on the ground of consanguinity, affinity, or precontract, or which, on the ground of nonage, were voidable by disagreement, were termed marriages *de facto*, and were held valid at law until dissolved. But in the spiritual courts objections of this kind were, during the lives of the parties, fatal to the legality of the marriage. It is in this sense that Lord Coke contrasts marriage *de jure*, and marriage *de facto*: the latter, unless dissolved during the husband's life, being valid for the purpose of conferring dower, on the ground that the spiritual courts were not then permitted to avoid it (*c*): and the term marriage *de facto* is used in the same manner by Lord Holt, in Hemming v. Price (*d*). It seems, therefore, that the distinction between marriage *de jure*, and the marriage *de facto*, which was sufficient to support the issue in the common law Courts, did not turn upon the mode of solemnization. In Weld v. Chamberlayne (*e*), where the issue was marriage or no marriage, it was assumed that proof of due solemnization was necessary.

The term marriage *de facto* has, however, occasionally been applied to marriages celebrated without the intervention of a priest; and according to some opinions, marriages of that description were sufficient for the purposes of many personal actions; and there are some cases which apparently sanction this view.

A case (*f*), at Nisi Prius, has been cited, in which it is said that a quaker marriage was held sufficient to support an action for criminal conversation; and the same point, with respect to an anabaptist marriage, was decided at Nisi Prius by Mr. J.

(*a*) 1 Show, 50. (*b*) See Co. Litt. 32, *a*, 33, *b*. Leigh v. Hanmer, 1 Leon. 53. Fenner's Case, Owen, 25. Dyer, 368, *b*. (*c*) Co. Litt. 32, *a*, 33, *b*. See Elliott v. Gurr, 2 Phill. 16. (*d*) 12 Mod. 432. (*e*) 2 Show, 300. (*f*) 1 Hagg. Appendix 9, *note*.

Denison, in a case (*a*) mentioned by Buller, who gives this explanation of it. "It has been doubted whether the ceremony must not be performed according to the rites of the church, but as this is an action against a wrong doer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of anabaptists, quakers, Jews, &c."

It is probable that these cases may have proceeded upon the distinction that, as against a wrong doer, possession is sufficient for most purposes, without strict evidence of legal right: at the time when they occurred, it had not been decided that presumptive evidence of the marriage would not support this action (*b*). Indeed, if marriages of this kind were looked upon merely as contracts *de præsenti*, they still formed an indissoluble bond, and gave to the husband an inchoate right to the enjoyment of the woman's society; her seduction was, therefore, an injury to him, for which it might reasonably be held that he should have a remedy by action. Lord Hale, in a note, where he speaks of contracts *de præsenti*, and of marriages imperfect by reason of nonage, puts a quære, "whether husband shall have trespass *de tali uxore abductâ* (*c*)?

From a note of Lord Keeper Guilford (taken when at the bar), given in his life by North (*d*), it appears that in the time of Lord Hale a special verdict was found on a quaker's marriage. The circumstance is mentioned by Guilford, only as an instance of the partiality towards the popular and sectarian parties, which he imputed to Hale. "This was gross," he says, "in favour of the worst of sectaries; for if the circumstances of a quaker's marriage were stated in evidence, there could be no colour for a special verdict; for how was a marriage by a layman, without the liturgy, good within the acts that establish the liturgy? The slur, in such cases, used to be this: in evidence, a cohabitation, and owning the children, as man and wife, passeth, without entering into the question of right, that properly belongs to another jurisdiction. But here, though the right was debated, and could not be determined for the quakers, yet a special verdict upon no point served to baffle the party that would take advantage of the nullity." Burnet,

(*a*) Woolston v. Scott, Bull, N. P. 28. See Douglas, 166. (*b*) Morris v. Miller, 4 Burr. 2057. 1 W. Bl. 632. (*c*) Co. Litt. 33, *a. note* 10. (*d*) Vol. 1, p. 126.

in his life of Hale, mentions this case; and states that it was an action against a quaker for debts owing by his wife before he married her: the defendant's counsel insisted that the marriage was not legal. "Hale," he says, "declared that he was not willing, on his own opinion, to make their children bastards, and gave directions to the jury to find it special." It does not appear whether the case proceeded further. Burnet says that Hale "considered marriage and succession as a right of nature, from which none ought to be barred, what mistake soever they might be under in the points of revealed religion;" and that "all marriages made according to the several persuasions of men ought to have their effects in law." But the course which he took shows that he did not consider it to be settled that the law of England adopted these liberal opinions; or that it would, even as against the husband, sustain a marriage not duly solemnized.

In another case, at Nisi Prius in 1661, a quaker marriage is said to have been held valid in an action of ejectment (*a*). These two cases occurred at a time when some uncertainty may naturally have arisen from the various changes which the ecclesiastical laws had recently undergone.

It has been said, that marriage *de facto*, or in reputation (as amongst the quakers), has been allowed by the temporal Courts to be sufficient to give title to a personal estate, because the lawfulness of the marriage is not in issue, for that the issue is, whether a marriage was contracted or not, or whether the parties lived in a married state, the legality of it not coming in question (*b*).

From the phrase of marriage *de facto, or in reputation*, here made use of, it may be inferred that this opinion alludes to cases, where marriages not solemnized, so as to be valid according to the ecclesiastical law, have been established in the temporal Courts by evidence of reputation in the manner mentioned in the above note of Lord Keeper Guilford. Proof of cohabitation, acknowledgement, and reputation, introducing a presumption, that there had been in some way a legal marriage, would in many proceedings be sufficient. And by this species of indirect and presumptive evidence, the marriage might be held to be proved for the purpose of the action, without breaking

(*a*) 1 Hagg. Appendix 9, *note*.

(*b*) Wood's Institutes of the Laws of England, p. 59.

in upon the general rule of law, that a solemnization *in facie ecclesiæ* was necessary to produce the civil effects of matrimony.

The opinion just quoted points at a distinction in this respect between real and personal property; and in Haydon v. Gould, a distinction was suggested between the case of the husband, and that of the wife and children (*a*). The latter suggestion might possibly have been influenced by the doctrine of the canon law, according to which, it seems, that the issue of a void marriage might be legitimate, if the parents, or either of them, had entered into it *bonâ fide*, and without notice of its invalidity (*b*): if this was the reason, the invalidity of the marriage was admitted. This doctrine of the canon law was not, however, adopted in England, at least not by the temporal courts; and it is, therefore, more probable, that the notion of a marriage not duly solemnized, being valid with reference to some civil rights, though not valid with reference to others, originated in the difference between the species of evidence requisite in different forms of proceeding. The admissibility, and the effect of indirect evidence offered to prove a marriage, would depend upon the nature of the suit, and the situation of the parties. Thus, in one case it was held, that presumptive evidence could not be received to prove a marriage *inter vivos* (*c*), and at present such evidence, though sufficient for most purposes, is not allowed in actions by the husband for criminal conversation (*d*). And where evidence of this kind is received, it has of course greater or less weight, according to the parties between whom the question arises. If the husband were defendant, as in the case before Hale, his simple acknowledgment would, *primâ facie*, be sufficient: some further proof would be required on a question of legitimacy; but still circum-

(*a*) See also 1 Leon. 53.

(*b*) A case before the Court of Session, in 1811, led to a learned discussion on this branch of the canon law, and on the question whether it formed part of the law of Scotland. A woman privately married to one man, during his life married another who was ignorant of the first marriage; the question was, whether a child of the second marriage was legitimate, on account of the *bona fides* of the father. The opinions of the judges were equally divided. See Report of a Case of Legitimacy under a Putative Marriage, &c. By Robert Bell, Esq. Edinburgh, 1825.

(*c*) Hervey v. Hervey, cited ante, p. 452. (*d*) Morris v. Miller, 4 Burr. 2057. 1 W. Bl. 632.

stantial evidence would be received, the children not being held to the strict proof, which is required of the husband when suing on a right founded on the marriage. This is probably what was meant in Haydon v. Gould, when it was said that the husband could not entitle himself by the *mere reputation of marriage*, though it might perhaps be different with the wife and children.

These considerations show, that cases in which the civil benefits of matrimony have been obtained in the temporal courts, through the medium of marriages not solemnized, so as to be valid according to the ecclesiastical law, are rather to be referred to the rules of evidence, than to any difference between the law on this subject, as administered by these tribunals. The authorities before adduced, which agree, that, according to the common law, the civil effects of marriage did not follow without a solemnization *in facie ecclesiæ*, are decidedly inconsistent with the idea, that the validity of the marriage could be properly recognized by the temporal courts, unless a solemnization was either directly proved or inferred from circumstances. It does not, indeed, appear, that any distinction was acknowledged between the temporal and spiritual law, with respect to marriage and legitimacy, excepting in the former not permitting a voidable marriage to be dissolved after the death of either of the parties, and not allowing a subsequent marriage to legitimate the issue. With these exceptions, the law of the ecclesiastical courts was referred to as the proper criterion for the decision of such questions, of which it was admitted to have the sole original cognizance. In some cases (e. g. dower and general bastardy), those courts were directly appealed to: in others, where the common law courts undertook the inquiry, their rules of evidence might be different; but it is clear that they professed to acknowledge the same rules of law which prevailed in the spiritual courts: they received the sentences and certificates of those tribunals, as conclusive authorities, when applying directly to the same question (*a*): and there could be no ground upon which the adjudication of one court could be adopted by another, unless it had also adopted the principles of law on which that adjudication was founded. It follows, that in whatever way the question of the validity of a marriage

(*a*) See Lord Chief Justice De Grey's judgment in the Duchess of Kingston's case, State Trials, vol. xx. p. 537.

might occur, the ecclesiastical law was equally the guide; if the marriage was shown to be such as that law did not recognize, it could not be supported by the temporal courts; and, therefore, between whatever parties the point might arise, and whether it was tried in a suit for administration, in a real action, or in ejectment, the law applied to it was the same, though the different effect which the same evidence would have in different modes of proceeding would frequently lead to different results.

The doubts which have been entertained upon this subject appear to have arisen chiefly from the language commonly made use of by the civilians and canonists, and thence occasionally adopted in the common law courts. According to the doctrines of the civil law, mutual consent alone was sufficient to constitute marriage (*a*); and the canon law followed the same notion to the extent of holding, that the contract of the parties was the essence and substance of the matrimonial union; and it was, therefore, commonly styled *ipsum matrimonium*. It was held, that the vinculum was complete by the contract, and that it formed a marriage *in foro conscientiæ*; and as the spiritual courts possessed the power of completing it, by enforcing solemnization, it had, for most of the purposes of their jurisdiction, the same consequences during the lives of the parties, as a marriage duly solemnized. But although the contract was, in many of its practical effects, only slightly distinguished from marriage; and although for these reasons the term *ipsum matrimonium* was applied to it, yet that expression was not used as denoting that the contract alone constituted a complete and perfect marriage, equivalent to that which had been ratified by the observance of religious rites. It was the substance without the form. The passage extracted above, from the judgment in Scrimshire v. Scrimshire, shows that the phrase *ipsum matrimonium* was thus understood in our ecclesiastical courts. It is in the same sense, that the expressions to be found in some other cases must be understood.

In Collins v. Jessot (*b*), Lord Holt is reported to have said,

(*a*) The law of Rome, however, admitted of several species of marriage, and did not attach the same civil consequences in respect of property to marriages constituted by consent alone as to the *solennes nuptiæ*. See Taylor's Civil Law, 266, *et seq.*, first edition. Browne's Civil Law, vol. i. p. 51. 71.

(*b*) 2 Salk. 437. 6 Mod. 155. Holt, 438.

according to Salkeld, that a contract *per verba de præsenti* is a marriage, and not releaseable. The other reports of the case, which give his judgment at greater length, represent him to have said, that the contract amounts to an *actual* marriage, which the parties themselves cannot dissolve by release or mutual agreement; for it is as much a marriage in the sight of God, as if it had been *in facie ecclesiæ:* he added, that there was this difference, that if they cohabited before marriage *in facie ecclesiæ*, they were for that punishable by ecclesiastical censures; and that, if, after such contract, either of them lay with another, they would punish such an offender as an adulterer. It is plain, that this was not intended to imply, that the contract constituted a legal marriage for all purposes; it is spoken of as a marriage in the sight of God, but as differing from a union legally complete in the most important particular.

In Wigmore's case (*a*), the same expression, that a contract *de præsenti* is a marriage, is attributed to Lord Holt, and was no doubt used in the same sense. He is said to have added, that the ecclesiastical courts could not punish for fornication after such a contract, which, however, is inconsistent with the last case, unless it refers to the distinction, that the censure was inflicted as a punishment for a contempt.

It is to be observed of both these cases, that they did not involve the question. They were motions for prohibitions to the spiritual courts; and the only question, therefore, was, whether the matters were of ecclesiastical cognizance, as to which there could be no doubt. Collins v. Jessot was a suit on a matrimonial contract. Wigmore's case is said to have been a suit for alimony; but on this point the report is defective, as suits for alimony alone are not allowed: the suit is always for some other purpose, as incidental to which, alimony is granted (*b*). But whatever the direct object of the suit may have been, it was plain, that as far as it depended on the question of marriage, the ecclesiastical court was the proper tribunal; and the observations of Holt on this point can therefore only be looked upon as dicta.

These two cases, and that of Haydon v. Gould (*c*), were referred to in Rex v. Luffington (*d*), where the question was,

(*a*) 2 Salk. 437. Holt, 459. (*b*) See ante, p. 309, and 2 Ves. jun. 195. (*c*) Cited ante, p. 451. (*d*) Burr. Sett. Cases, 232.

whether a marriage solemnized by a person, who at the time was erroneously supposed to be in orders, was sufficient to give the wife a settlement in the husband's parish. The question was similar to that put by Lord Stowell, in Hawke v. Corri (*a*): the court does not appear to have expressed any opinion on the point, and declined to decide it, on the ground that it was not positively stated whether the person who had performed the ceremony was, or was not, in holy orders. If they had supposed a contract to constitute a marriage, the inquiry into this fact would not have been material.

In Lantour v. Teasdale (*b*), the language of Lord Holt in the cases before referred to was adopted; but in that case the marriage was solemnized by a priest, and the point, therefore, did not arise; and it did not come in question what species of marriage would confer the civil rights of dower, &c.

The elaborate and learned judgment of Lord Stowell, in the case of Dalrymple v. Dalrymple, requires more attentive consideration. His Lordship in that case took a view of the state of the general canon law of Europe previous to the Council of Trent. At that time he observed, that the canon law, "although, in conformity to the prevailing theological opinion, it reverenced marriage as a sacrament, still so far respected its natural and civil origin, as to consider that where the natural and civil contract was performed, it had the full essence of matrimony, without the intervention of a priest: it had, even in that state, the character of a sacrament; for it is a misapprehension to suppose that this intervention was required, as matter of necessity, even for that purpose, before the council of Trent. It appears from the histories of the Council, as well as from many other authorities, that this was the state of the earlier law, till that Council passed its decree for the reformation of marriage. The consent of two parties expressed in words of present mutual acceptance constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de præsenti*; improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage; and, therefore, Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ, ipsas nuptias sponsalia appellavit* (*c*)."

(*a*) Ante, p. 454. (*b*) 8 Taunt. 830. 2 Marsh, 243.
(*c*) 2 Hagg. 64, 65.

If this passage were understood as implying that a matrimonial union, formed by consent alone, was at the time referred to universally held to be equally complete with a marriage attended with ecclesiastical solemnities, it would certainly be giving it a meaning too wide, and probably beyond what the learned judge intended to express; for in a succeeding passage it is admitted, that different rules relative to their effect in point of legal consequences were applied to marriages of this description and to regular marriages, that every thing was presumed to be complete and consummated in substance, but not in ceremony; and the ceremony was enjoined to be undergone as matter of order (*a*). The term legal marriages, which is here applied to matrimonial contracts, seems not to be used in an unqualified sense, or as implying them to be in all respects complete.

It is certain, indeed, from Selden's dissertation on the point, that long before the Council of Trent, an opinion had been very generally, if not universally, adopted in the church, that though the contract of the parties formed the substance and *vinculum* of the marriage, the sacerdotal benediction was essential to render it complete (*b*). Whether the contract alone had the character of a sacrament, was a point upon which divines differed (*c*). The decree of the Council of Trent contained a declaration of the previous validity of clandestine marriages (*d*). This, however, applied more immediately to marriages had

(*a*) 2 Hagg. 65.

(*b*) See Selden, Ux. Eb. lib. ii. chap. 28. See also Ayliffe's Parergon, p. 364, and the Constitutions of Leo, and Gothofred's Annotations. Corp. Jur. Civ. ed. 1720, vol. ii. p. 620. The latter says, "Non est matrimonium cui sacrorum benedictio defuit." The doctrine is ascribed by Selden to an imitation of the Pagan and Jewish customs. It was commonly said to have been introduced into the church as matter of positive enactment, by a decretal epistle of Pope Evaristus, in the second century, which was referred to as having established "incestum haberi connubium cui sacerdos non adfuisset consecrassetque illud." Ux. Eb. *ub. supra.* And though the authenticity of this epistle is questioned by Selden, its doctrine was adopted by several writers of authority whom he cites, and appears to have met with general reception; and whatever its origin may have been, it was quite natural that a notion which added dignity to the clergy, and gave to the church an important branch of jurisdiction, should have been readily embraced.

(*c*) See Selden, *ub. sup.* Sanchez de Matrimonio, lib. 2. disp. 6.

(*d*) See 3 Phill. 64.

without the consent of parents, than to unions formed without spiritual intervention, which were technically designated by the term *sponsalia:* and if this declaration did comprise unsolemnised contracts, still, from the manner in which the decree was prepared and passed, its inconsistencies, the opposition it encountered, and the partial reception which it met with, it cannot be looked upon as conclusive evidence of the previous opinions of the church (*a*); and giving it the largest construction which its language admits of, it by no means shows that the former doctrine placed the contract or *sponsalia* on the same footing as marriage celebrated by a priest.

The distinction which existed is exemplified by the term *sponsalia de præsenti,* which the canonists had introduced and applied to present contracts of marriage, as distinguished from marriages solemnised. The term was not known to the civil law: as by that law a present contract constituted a marriage, there could be no *sponsalia,* except those which referred to a future period; and the term *sponsalia de præsenti* was therefore often objected to as a refinement invented by the canonists (*b*). Thus Swinburne says, that the contract *de præsenti* was in nature and substance rather matrimony than spousals; and that the canonists, though they invented the distinction, yet they oftentimes made no difference, or very little, between the nature and effects of spousals *de præsenti,* and of matrimony solemnized and consummated (*c*). But though the practical effect of the distinction was in many respects slight, its existence and acceptance amongst the canonists is proved by the technical description of unsolemnized contracts, under the term *sponsalia* (*d*), denoting a betrothment, or an inchoate and imperfect union; and this distinction became important where the temporal law, as in England, attributed the civil effects of matrimony only to those marriages which were legally complete.

The important change introduced by the Council of Trent was in the prospective part of its decree, which declared that

(*a*) See Father Paul's History of the Council of Trent, book viii.

(*b*) 2 Hagg. 65. Heineccius. Elem. Jur. Nat. chap. ii. sec. 30.

(*c*) P. 3. 9.

(*d*) "Quemadmodum jure Cæsareo, uti etiam plerumque pontificio, sponsalia sunt ipsi matrimonii contractus seu stipulatio, et in consuetudinem illam vitæ repromissio, nuptive vero quæ a sponsalibus distinguuntur, solennes illæ ritus insequentes quibus matrimonium perficitur, celebraturque." Selden, Ux. Eb. lib. ii. ch. 1.

marriages, unless contracted in the presence of a priest and two witnesses, should be entirely void, thus destroying the effect of the contract; the former rule, that the consent of the parties was the substance of the marriage, and completed the *vinculum*, was annulled: and hence, in the countries where the decree of that council was received, the intervention of the priest became necessary, not only to the solemnization of marriage, but to the binding effect of matrimonial contracts or *sponsalia*. The apparent difference between Lord Stowell's judgment and other authorities, seems to arise from his Lordship giving the title of marriage to what was technically known under the name of *sponsalia*, and from his referring more to that which constituted the *vinculum*, than to that which was essential to make the marriage in all respects complete. In attributing to the Council of Trent the rule requiring the intervention of a priest (*a*), his Lordship can only be understood to refer to the decree having made that intervention necessary to form the *vinculum*, the opinion that it was necessary to form a perfect marriage having prevailed long before.

The decree of the Council of Trent not having been received in England, the binding effect of a contract entered into by the parties alone was still preserved here; and there is no reason to suppose that the doctrines promulgated by that Council could by any indirect influence have led our courts to establish the rule requiring a solemnization of marriage by a priest. It appears, indeed, from several of the authorities referred to above, that, previous to the date of that council, that rule was understood to exist in England; its existence can only be ascribed to doctrines of the church originating at an earlier period.

Lord Stowell, in his judgment, proceeds to remark, that "at the Reformation this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The

(*a*) 2 Hagg. 82.

ecclesiastical courts, therefore, which had the cognisance of matrimonial causes, enforced these rules; and amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti*, valid to the full extent of avoiding a subsequent regular marriage contracted with another person (*a*)." His Lordship afterwards adds, that "the common law certainly had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage (*b*)." These passages, though not alluding to cases such as those of Haydon v. Gould, and not explaining in detail the extent to which the religious view of the nature of marriage continued to influence the proceedings of our ecclesiastical courts, are not in substance inconsistent with the observations here offered. It is affirmed only that the contract had the effect of vitiating a subsequent marriage with another, and the proposition, that it did not confer the civil rights which flow from a legal marriage, is not disputed.

It will be observed, that in the passage last cited from Lord Stowell's judgment, as well as in the passages referred to in Swinburne (*c*), the rule excluding unsolemnized contracts from the civil privileges of legal matrimony is attributed to the doctrines of the common law. It is clear, however, that the common law, if by that be meant the law administered by the temporal courts, interfered no further than to require a lawful marriage, as the foundation of civil rights, leaving the question what was a lawful marriage to be determined according to the law administered by the ecclesiastical courts: if a woman united to a man by contract only, without solemnisation *in facie ecclesiæ*, did not recover dower, it was only because the ecclesiastical courts refused to acknowledge such an union as *legitimum matrimonium*. It was the same with respect to legitimacy, which depended in general on the bishop's certificate. There was certainly no rule by which the civil tribunals required any marriage ceremonies, except those which the ecclesiastical courts considered essential to constitute lawful matrimony.

It will have been noticed that the judgment referred to, in speaking of the sentences enforcing solemnization in pursuance of contracts, mentions that this solemnization was enjoined as matter of order. It is not, however, to be inferred that the

(*a*) 2 Hagg. 67. (*b*) Ibid. 68. (*c*) *Ante*, p. 455.

solemnization was decreed merely for the sake of public order and decorum: for it is known that these sentences were not the result of any species of public prosecution, but that they were made in suits instituted by one of the contracting parties, desiring the benefit of the contract, and for that purpose calling on the other party to proceed to solemnization. The common practice of instituting suits for this object would be quite inexplicable, unless the authorities be correct in stating that the solemnization was essential to confer the privileges of marriage.

The various authorities here adduced establish the proposition, that according to the law administered in England before the Marriage Act, a matrimonial contract *de præsenti* was essentially distinct from a marriage solemnized by a person in holy orders; that it did not confer on the woman the right to dower; on the man the right to the woman's property; or on the issue the rights of legitimacy; and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for a sentence annulling it. They seem also to show, that, according to the ecclesiastical law, the contract did not give any right, except to call for a performance of it by actual solemnization, not justifying cohabitation, and not conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited, and were reputed to be man and wife, this might be sufficient evidence for the purposes of some actions in which strict proof was not required (*a*).

(*a*) According to some of the opinions given in evidence in Dalrymple v. Dalrymple, 2 Hagg. Appendix, p. 17, *et seq.*, it seems, that in Scotland solemnization of marriage *in facie ecclesiæ* was indispensable previously to the Reformation, that some relaxation of this rule had been introduced by the statute 1503, ch. 77, by which marriage by habit and repute was made sufficient to entitle the widow to her terce; and that the law was gradually changed by the new doctrines introduced at the Reformation. For some time it continued to be the practice to compel a party who had entered into a contract of marriage to complete it by solemnization; this had been abandoned, and other modes of constituting marriage were admitted; but upon the question what mode was sufficient, the greatest variety of opinion existed, together with some fluctuation of decision, until the law was settled by the cases of Dalrymple v. Dalrymple, and M'Adam v. Walker. Some thought that a mutual declaration of present consent in private, without consummation, constituted a marriage; but it was admitted that the case of M'Adam v. Walker was the first in which such a marriage was established. Others were of opinion, that if there were no cohabitation or carnal intercourse, contract or consent alone would not be suf-

The marriages of Jews and Quakers are excepted out of the operation of the first Marriage Act, as well as of that now in force. The exception is confined to cases where both the parties are Jews or Quakers (*a*).

With respect to the Jews, it appears that their marriages have at all times been celebrated according to the rites of their own religion, and the legal validity of such marriages has been recognized in various cases, as well before (*b*), as since (*c*), the

ficient, and that either party might resile, unless there had been some species of celebration, though without defining what form was to be observed, and allowing that the assistance of a clergyman might be dispensed with. It was said (with singular vagueness) that, *rebus integris*, marriage could "only be constituted by a consent adhibited in the presence of a clergyman, *or in some other solemn mode equivalent to actual celebration.*" 2 Hagg. Appendix, 132: the practice in Gretna Green marriages, of going through the form of the marriage service, was probably intended to conform to this opinion. The distinction between contracts *de præsenti*, and contracts *de futuro*, was not admitted by all; but it was generally agreed, that a contract or promise, followed by a copula, amounted to marriage; and some, it seems, thought that the law of Scotland would look with equal indulgence on a copula antecedent to the contract. 2 Hagg. 97, Appendix, 140. On the other hand, it was thought by some that a contract, or promise *cum copulâ*, would be defeated by a subsequent regular marriage between one of the parties and another person. The difference between the laws of England and Scotland, in this respect, may be ascribed partly to the different courses which the Reformation took in the two countries, and perhaps partly to the jurisprudence of the latter having been more influenced by the civil law. In Scotland the abolition of episcopacy introduced a different view of the nature of the sacerdotal office; the doctrine of the distinct and indelible character of the priesthood, and of the authority entrusted to them by a divine commission, derived through successive consecrations and ordinations from the apostolic ages, was not retained: and this, together with the change of the ecclesiastical jurisdiction, naturally led to the idea that the ministration of a clergyman could give no peculiar efficacy to a ceremony; and the opinion that marriage was merely a civil contract ultimately prevailed. In England, the church departed less widely from its ancient doctrines; episcopal jurisdiction and ordination were retained, and the doctrine of the spiritual nature of marriage was never lost sight of. It is probably from the same cause, that another important distinction between the laws of the two countries has arisen: the Scotch law allowing divorces *à vinculo*, while that of England adheres to the doctrine of the indissolubility of marriage, a doctrine founded on the religious view of the subject.

(*a*) Jones v. Robinson, 2 Phill. 285. (*b*) Andreas v. Andreas, 1 Hagg. Appendix, 9, *note*. La Costa v. Villa Real, 1 Hagg. 242, *note*. See Franks v. Martin, 5 Bro. P. C. 151. 155. (*c*) D'Aguilar v.

Marriage Act. And questions arising upon them are determined by the Jewish law, which is ascertained in the same manner as a foreign law, by the testimony of its professors (*a*).

This exception to the general law has probably arisen from the peculiarities attending the state of the Jewish nation in England: having always been looked upon as a distinct people, and having for a long time been treated rather as aliens, than as native subjects. During the earlier periods of their residence in England, they were so far severed from the rest of the inhabitants as to be subjected to a distinct judicature, regulated to a certain extent by their own laws (*b*).

The cases of Lindo v. Belisario, and Goldsmid v. Bromer, show, that whatever may have been the origin of the exemption of Jewish marriages from the general law, it has not arisen from an opinion, that a present contract alone constituted a marriage, and that the form of solemnization was therefore immaterial. In each of those cases, it was clear that what had passed amounted to a contract *per verba de præsenti*, and that it was looked on by the parties as an actual marriage: in the latter case consummation had followed. The substance of the matrimonial contract was complete; but in each of these cases, the sentence of nullity was pronounced, on the ground of the ceremony being imperfect according to the Jewish law. These marriages, therefore, are not supported as contracts: a compliance with the Jewish ceremonials being essential to their validity.

It is less easy to ascertain what principles of law are now to be applied to the marriages of Quakers. The question must,

D'Aguilar, 1 Hagg. 134, *note*. Vigevena v. Alvarez, ibid. Appendix, 7, *note*. Lindo v. Belisario, 1 Hagg. 216. Goldsmid v. Bromer, ibid. 324. Horn v. Noel. 1 Campb. 61.

(*a*) Lindo v. Belisario. Goldsmid v. Bromer, *ub. supra*.

(*b*) Mad. Hist. Exch. chap. 7. sec. 3. See 2 Hagg. 217, *note*. 2 Swan. 505, *note*, and Prynne's Short Demurrer to the Jews' long discontinued barred remitter into England. It seems that the wife's right to dower, and the descent of lands, were governed by the Jewish law. Prynne gives a writ to the justices of the Jews, in 23 Hen. III., directing them to put the two sons of one Samuel, a deceased Jew, into possession of his lands and chattels, on payment of a fine, "salvo uxori ejusdem Samuelis rationabili dote suâ, secundum legem et consuetudinem Judæorum," p. 27. By letters patent in 54 Hen. III., the King confirmed to a Jew a house in London, devised to him by his father by a will, "secundum consuetudinem Judaismi nostri," p. 65.

in a great measure, depend on the state of the law previous to the statute 26 Geo. II., with reference to marriages of protestant dissenters, celebrated in their own congregations: and it does not appear that there has been any solemn decision on this point, excepting in the case of Haydon v. Gould.

In a case in Levinz (*a*), which occurred a few years after the Toleration Act, it appeared, that a marriage between two protestant dissenters (who had taken the oaths, and made the declaration according to that act), had been celebrated in their own congregation: they had afterwards been libelled against in the ecclesiastical court, and pleaded this matter by way of defence; but the court refused to admit it. A motion was then made for a prohibition, and Levinz says, that it was agreed that a prohibition should go, and that the plaintiff should declare on the prohibition, so that upon a demurrer the law might be tried. It does not appear whether this case received an ultimate decision (*b*).

It was followed by the case of Haydon v. Gould, which tends strongly to show, that the question raised in Hutchinson v. Brookebanke was not settled in favour of the validity of dissenters' marriages. It does not, indeed, appear, whether the parties in Haydon v. Gould had taken the oaths, and subscribed the declaration required by the Toleration Acts: but the case seems always to have been looked upon as a decision applicable to such marriages generally. Thus it is said, in one statement of that case, that "the act of 7 and 8 Will. III. chap. 35, seems to put this matter out of all doubt, which lays a penalty on clergymen in orders, if they celebrate marriage in a clandestine manner; for if the same privileges attended marriages solemnized by the dissenters, as those celebrated according to the church of England, how easily would that act be evaded, or rather rendered of no effect. There would then be no occasion for license or banns, for making oath, or giving security that there were no legal impediments; but every one might do what was right in his own eyes, who should get himself admitted of a dissenting congregation (*c*)."

In the case of Green v. Green (*d*), a Quaker marriage seems to have been thought not sufficient to entitle to the restitution

(*a*) Hutchinson v. Brookebanke, 3 Lev. 376. (*b*) See 1 Hagg. Appendix, 7. (*c*) 2 Burn's Ecclesiastical Law, 472. See also Browne's Civil Law, vol. 1, p. 75, *n.* (*d*) 1 Hagg. Appendix, 9, *note.*

of conjugal rights. In another case (*a*), in the year 1730, the libel pleaded a marriage, had in the manner usually observed amongst the Quakers, by public declaration at their monthly meetings, and that notwithstanding the defendant had refused to *solemnize* and consummate. The defendant admitted the contract, alleging it to be conditional. There were two sentences against him in the consistory of Durham, and afterwards at York. It seems that there was an appeal to the delegates, the result of which does not appear; but as far as the case went, this species of marriage was treated as standing only on the footing of a contract.

The argument which has been drawn from the Toleration Act certainly receives some countenance from the judgment of Sir J. Nicholl, in the case of Kemp v. Wickes, where the question was, whether baptism by a dissenting minister was sufficient to entitle the party to the rites of burial according to the forms of the church. It was decided, that baptism by a layman would have been sufficient for this purpose; and it was not, therefore, necessary to consider whether the performance of the ceremony by a dissenting minister would be looked upon in law as different from a performance of it by a layman. But Sir J. Nicholl appeared to think, that this question might be materially affected by the Toleration Act, and thought that dissenting ministers, being now legalized, it could not be said, that rites and ceremonies performed by them were not such as the law could recognize in any court of justice (*b*).

On the other hand, it is to be observed, that it was plainly not the meaning of the Toleration Act to confer on dissenters any thing beyond an immunity from the penalties to which they were before subjected: as Lord Hardwicke observes, it gives no new right, but only an exemption from the penal laws (*c*). It would, therefore, be difficult to maintain that this act could give to the religious ceremonies of dissenters any additional efficacy in conferring the civil rights of marriage, though it might perhaps form a ground for contending, as in Hutchinson v. Brookebanke, that such marriages and cohabitation after them were no longer punishable. The spiritual court, however, in that case refused, as it seems, to admit the

(*a*) Dodgson v. Haswell, ibid. (*b*) Judgment of Sir J. Nicholl, upon the admission of articles in Kemp v. Wickes, London, 1810. Butterworth, see p. 36. (*c*) 2 Swan, 490, *note*. See 3 Mer. 405.

plea, even for the purpose of defence, and the Irish statute 11 Geo. II. chap. 10, sec. 3 (*a*), proves that the Toleration Act in that country (which corresponds with the English Act) was not considered to justify the cohabitation of dissenters married according to their own forms. The cases of Haydon v. Gould, Green v. Green, and Haswell v. Dodgson, are much opposed to the notion, that such marriages had acquired for other purposes any force beyond that of contracts. In Collins v. Jessot, and Wigmore's case, they are treated as contracts only. The statute 7 and 8 Will. III. (passed shortly after the case of Hutchinson v. Brookebanke), indicates, that at that time their validity was not acknowledged: the subsequent statute 10 Anne, c. 19, in omitting to notice any marriages, except those solemnized by priests, raises a similar inference. And the opinions extracted above, from Wood and Buller, only speak of such marriages as being good for the purpose of actions where their legality did not come in question.

The Irish statute 21 and 22 Geo. III. chap. 25 (*b*), was in form declaratory, but it is clear that it in fact introduced a new law. This appears from the previous statute 11 Geo. II. A learned writer before referred to, who states the general matrimonial law of Ireland to require the intervention of a priest, considers, indeed, that the marriages of dissenters had, before the statute 21 and 22 Geo. III., acquired validity for some purposes. He states (*c*), that such marriages, if solemnized according to their own rites, and if both parties were of the same persuasion, were good to all civil effects; for instance, to support an ejectment where legitimacy came in question, or an action for criminal conversation; but that, if they came to entitle themselves to any rights in the ecclesiastical courts, as to administration, they must prove a marriage according to the ecclesiastical law: for the latter point, he refers to Haydon v. Gould. It does not, however, appear, whether this partial exception to the general law was supposed to have originated with the Toleration Act, or upon what foundation it stood. It may probably be referred to those distinctions in the rules of evidence which have been alluded to above. Upon any other principle, it would be difficult to account for the distinction supposed between the species of marriage sufficient for

(*a*) *Ante*, p. 458. (*b*) *Ante*, p. 459. (*c*) Browne's Civil Law, vol. i, p. 75, *note*.

the purposes of an ejectment, and that required by the law of the ecclesiastical courts for the purposes of their proceedings. The question of legitimacy in a real action, would necessarily depend directly on the rules of the spiritual law; and it would have been singularly anomalous, if there had been one law of legitimacy in real actions, and another in ejectment.

These remarks refer to the marriages of dissenters in general before the Marriage Act; but some of the views which might then have been adopted with reference to other sects could not be applied to the case of the Quakers. Their mode of celebrating, or rather of declaring a marriage, partaking scarcely, if at all, of the nature of a religious ceremony, would have rendered it more difficult to distinguish their marriages from mere contracts. And if the opinion hinted at in Kemp v. Wickes (*a*), that the Toleration Act gave a new character to dissenting ministers, could be carried to the extent of contending, that it placed religious ceremonies performed by them, on the same footing in point of legal effect, with those performed by persons in orders, this argument could not be urged in support of the marriages of Quakers, as their practice does not admit any distinct ministers. For the same reason the terms of the Irish statutes 11 Geo. II. chap. 10, and 21 and 22 Geo. III. chap. 25, do not in strictness include Quakers: they speak only of matrimonial contracts entered into before dissenting ministers or teachers, and of marriages solemnized by them.

But another view of this question, as it regards the present state of the law, arises from the clause introduced into the first Marriage Act, and repeated in the subsequent acts, by which the marriages of Quakers are excepted. This clause may, perhaps, be looked upon as a legislative recognition of the validity of these marriages, indirectly legalizing them, and there are some expressions to be found favourable to this view (*b*). If, however, these marriages were previously invalid, or valid only to a certain extent, it is not very obvious that additional efficacy could be given to them by a statute declaring that nothing therein contained shall extend to them. If this had been the design of the legislature, different expressions would have been used; the exception was, no doubt, made from its being known that the scrupulous adherence of the

(*a*) *Ante*, p. 478. (*b*) See 1 Hagg. Appendix, 8. 2 Phill. 285. 2 Burn's Ecclesiastical Law, 486.

Quakers to their own tenets, precluded the expectation of their conforming to the regulations of the Act; and the intention most probably was to leave their marriages in their previous condition, to be judged of by the previous law, and with that qualified and doubtful validity which they were then considered to possess. Thus it has been seen that, according to some opinions, these marriages were at that time valid for some purposes only: and if those opinions were correct, it would be very difficult to maintain that the Marriage Act has rendered them valid for any other purpose.

The weight of the authorities seems, however, to show, that although persons claiming under these marriages might succeed by means of indirect and presumptive evidence, yet that the law did not recognise their validity, and that their only legal effect was derived from their being contracts *de præsenti*, which might be enforced by the spiritual courts, till that jurisdiction was taken away by the Marriage Act. If this conclusion be correct, it will follow that the Act, unless it has legalised the marriages of Quakers, has deprived them of that effect which they previously had. It is plain, however, that it was not intended to render them less effectual than before: and this may be urged in favour of the opinion, that the Act has operated to confirm them.

Since the Act, the validity of the marriages of Quakers does not appear to have come in question, at least not in any reported case. This has probably arisen from their prudent and peaceful habits, and perhaps partly from the circumstance of its not being either the interest of any members of their own families, or the disposition of the crown, to raise the objection. If the law on this subject should not be fixed by a legislative measure, and if the question should call for a judicial decision, the Courts would no doubt be strongly inclined, upon obvious principles of reason and justice, as well as from the number and respectability of the persons interested, to support these marriages, whatever difficulty there may be in finding grounds upon which their validity can be reconciled with the former law: perhaps the least objectionable mode of sustaining them would be to consider the saving clause in the Marriage Act as a recognition precluding the inquiry into their former condition.

Supposing the decision on the general question of the legality of the marriages of Quakers to be in their favour, the

ground on which that decision may proceed will influence some other questions which may arise. If it should proceed upon the notion that they had before the Act acquired validity for some purposes, it will, upon that supposition, be at least doubtful whether they can now be held to confer all the rights of marriage. If the decision should proceed upon the argument deduced from the Toleration Act, it will be a question whether the parties must not be shewn to have brought themselves within that Act, by subscribing the declaration which it requires (*a*). It is also at present uncertain what may be decided as to the particular mode in which a marriage may be constituted between Quakers, whether the mere contract or engagement of the parties, without public ceremonial or parental consent, be sufficient, or whether an observance of any forms be essential; nor does there seem to be any certain rule for determining what is the proper form, or what degree of departure from it may be fatal: varieties of opinion and practice may exist at different times, and in different congregations: and there is not, as amongst the Jews, any ancient and settled law, which can be referred to for the decision of such questions (*b*).

By the statute 3 Geo. IV. c. 75, marriages which had been solemnized by license obtained without the proper con-

(*a*) The statute 52 Geo. III. c. 155, dispenses with the oath and declaration as to Dissenters in general, and extends the benefit of the Toleration Act to persons preaching at or resorting to meeting-houses duly registered. But this statute does not extend to Quakers.

(*b*) The expediency of settling the doubts relative to the marriages of Quakers, by a declaratory law, is understood to have been intimated by an high authority in the House of Lords, during the last session of Parliament. There are some other parts of the law of marriage in this kingdom, to which the attention of the legislature might also be beneficially directed. With respect to Jewish marriages, it is singular that a law, by which a marriage may be annulled on proof that a person has eaten meats forbidden to that nation, stirred a fire, or snuffed candles on a Saturday, [1 Hagg. 324,] should have been so long allowed to exist; and few can doubt that our Courts ought to be relieved from the necessity of admi-

sent, and which were, therefore, void under the statute 26 Geo. II. c. 33, were rendered valid in cases where the parties had continued to cohabit (*a*) until the death of one of them, or until the passing of the Act, or where they had only discontinued their cohabitation for the purpose of or during the pendency of any proceedings touching the validity of such marriage. The Act excepted cases where the invalidity of the marriage had been declared by any Court of competent jurisdiction, or established upon the trial of any issue, or acted upon by any judgments, decrees, or orders of Court, or where either of the parties had during the life of the other lawfully intermarried with another person; and it provided that where any property, real or personal, had been possessed, or any title of honour enjoyed, on the ground of the invalidity of any such marriage, the right and interest in such property, or title of honour, should not be affected. These retrospective provisions did not include marriages by banns, and, therefore, marriages which were invalid under the former law, from the banns not having been duly published, are still void (*b*).

The statute 3 Geo. IV. c. 75, also contained provisions with respect to future marriages. These, together with the old Marriage Act, 26 Geo. III. c. 33, have been repealed by the late Act 4 Geo. IV. c. 76, which comprises the enactments that now regulate marriages in this country.

The first section of this statute repeals the former Acts; the second prescribes the mode of publishing banns, and of per-

nistering such a law. With respect to Scotland, whatever difference of opinion there may be as to the policy of controlling the choice of minors, it must be admitted by all, that the variety and uncertainty of the evidence by which marriage may in that country be established, is calculated to produce great insecurity and confusion. And the difference between the law of divorce, as administered in Scotland and in England, has introduced much uncertainty, and some strange anomalies. See Lolley's case, Russ and Ryan's Crown Cases, p. 237, and Tovey v. Lindsay, 1 Dow. 117. In Ireland, the law by which the validity of a marriage depends, in many cases, on the religion of the parties, besides opening a door to the most infamous frauds, occasions frequently similar uncertainty, from the question turning on a point, as to which there must often be an absence of clear proof. See 2 Addams, 471, and Irish T. R. 259.

(*a*) See Bridgwater v. Crutchley, 1 Addams, 473. (*b*) Stanhope v. Baldwin, 1 Addams, 93.

forming the ceremony, nearly in the same terms as the old Act. The third, fourth, fifth, and sixth sections enable the bishop of the diocese, with the consent of the patron and incumbent, to authorise the publication of banns, and the solemnization of marriage, in other chapels; and the laws respecting registers are extended to such chapels. The next two sections are borrowed from the old Act: the seventh provides that seven days notice of the names of the parties, their places of abode, and the time of their residence, shall be given to the minister before publication of banns; and the eighth exempts the minister from punishment for marrying minors without the consent of parents or guardians, unless with notice of their dissent (*a*). By the ninth section, if the marriage be not had within three months after the complete publication of banns, they must be republished in the same manner. By the tenth, licenses are only to be granted for marrying where one of the parties has resided for fifteen days. By the eleventh section, if a caveat be entered against the grant of a license, it is not to be granted, until the matter has been examined by the judge out of whose office it is to issue. The twelfth section enacts, that parishes not having any church or chapel, and extra parochial places, not having chapels in which banns may be published, shall be deemed to belong to any adjoining parish or chapelry.

The thirteenth section provides, that when a church or chapel is disused, from being under repair, or from being taken down to be rebuilt, the banns may be published in any place within the parish or chapelry licensed by the bishop for the performance of divine service, or in the church or chapel of any adjoining parish or chapelry: where no place is so licensed, the marriage may be solemnized in such adjoining church or chapel; and marriages heretofore solemnised in other places within parishes or chapelries, on account of the church or chapel being under repair or taken down to be rebuilt, are not on that account to be questioned (*b*).

The fourteenth section enacts, that previous to the grant of

(*a*) Formerly the minister was liable to censure in the ecclesiastical courts for marrying without the consent of parents, though ignorant of their dissent. Bridgen's case, 2 Burn. Eccl. Law, 432.

(*b*) See Stallwood v. Tredger, 2 Phill. 287, and stat. 5 Geo. IV. c. 32, cited *post*.

a license, one of the parties shall swear to his or her belief that there is no lawful impediment, and to their residence; and also, where either of the parties, not being a widow or widower, is under the age of twenty-one, that the consent of the persons whose consent is required by that Act has been obtained; but it is provided, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license notwithstanding the want of any such consent.

By the fifteenth section, no bond or other security is to be required on granting licenses. The sixteenth declares that the father, if living, of any minor, not being a widower or widow, or if the father shall be dead, the guardian or guardians of the person of the party lawfully appointed, or one of them; and if none, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage; and such consent is thereby required, unless there shall be no person authorised to give such consent.

The seventeenth section provides, that where the father is *non compos mentis*, or where the guardian or mother, whose consent is requisite, is *non compos mentis*, or beyond the seas, or unreasonably refuses to consent, the Court of Chancery may authorise the marriage. This clause corresponds with that in the old Act, but is extended to the case of the father being lunatic.

The eighteenth section provides for the oath of office to be taken, and the security to be given by the surrogates deputed to grant licenses: by the nineteenth, licenses are to be in force for three months only; and by the twentieth, the power of the Archbishop of Canterbury to grant special licenses is preserved. The twenty-first makes it felony, punishable by fourteen years transportation, knowingly and wilfully to solemnize matrimony in any other place than a church or chapel, wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon (unless by special license), or without due publication of banns or license; and the same punishment is enacted for persons falsely pretending to be in holy orders, who shall solemnize matrimony according to the rites of the church of England: prose-

cutions under this clause are to be commenced within three years.

The twenty-second section declares, that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published (unless by special license), or shall knowingly and wilfully intermarry without due publication of banns or license from a person having authority to grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnisation of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

By the twenty-third section it is enacted, that where any valid marriage of a minor by license shall be procured by the false oath of either party, as to the matters required to be sworn to, such party wilfully and knowingly so swearing; or if any valid marriage of a minor by banns shall be procured by a party thereto, knowing that the minor had a parent or guardian then living and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published, and having knowingly caused or procured the undue publication of banns, the Attorney or Solicitor-General may file an information in the Court of Chancery or Exchequer at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for the costs, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued, or shall accrue, to the party so offending, by force of such marriage: and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property as shall then have accrued, or shall thereafter accrue, to such offending party by force of such marriage, shall be secured under the direction of such Court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage; and if both the parties so contracting marriage shall, in the judgment of the Court, be guilty of any such offence as aforesaid, it shall be lawful for the said Court to settle and secure such property, or any part thereof, imme-

diately for the benefit of the issue of the marriage, subject to provisions for the offending parties, by way of maintenance, or otherwise, as the said Court, under the particular circumstances of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other. Before filing such information, affidavit must be made of the circumstances, and that the relator had not discovered the marriage more than three months before his application to the Attorney or Solicitor-General. By the twenty-fourth section, all agreements, settlements, or deeds, upon such marriages, are made void, so far as they may be inconsistent with the directions given by such Courts; and by the twenty-fifth section, such informations must be filed within a year from the solemnisation of the marriage.

By the twenty-sixth section, proof of the residence of the parties is not required after the marriage, and evidence to prove non-residence shall not be received in any suit touching the validity of the marriage. The twenty-seventh section repeats the clause in the old Act, providing that no suit shall be had to compel celebration of marriage *in facie ecclesiæ*, by reason of any contract, whether *per verba de præsenti*, or *per verba de futuro*. The twenty-eighth provides, that marriages shall be had in the presence of two witnesses, and the register attested by them and by the minister: and the twenty-ninth makes it felony to insert in the register-book any false entry relating to a marriage; or to make, alter, forge, or counterfeit any such entry, or any license of marriage, or to utter them as true, or to destroy any register-book, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of the Act. The thirtieth section excepts the marriages of the Royal Family, and the thirty-first excepts the marriages of Quakers and Jews. By the last section the Act is only to extend to England.

The consent required to the marriage of a minor by this Act, is the same as under the old Marriage Act, excepting in cases where the minor is without a legal parent or guardian, and where there is therefore no person having authority to consent. In such cases the Ecclesiastical Judge, or the surrogate, has power to grant the license of his own authority. But a guardian may, nevertheless, still be appointed by the Court of

Chancery, for the purpose of consenting, and this has been done in some cases which have occurred since the Act.

The guardian "lawfully appointed," is considered to mean only a guardian appointed by the father under the statute 12 Car. II. c. 24 (*a*): and consent to a marriage can, therefore, not be given by a guardian of any of the other kinds known to the law, excepting a guardian appointed by the Court of Chancery; and although the latter would, in general, supersede the authority of the mother, yet, under the express terms of the Act, his power with respect to marriage does not arise so long as the mother is living and unmarried.

The most important alteration in the law by the late statute, is the repeal of the clause in the statute 26 Geo. II. c. 33, declaring null and void marriages not solemnised in the mode there prescribed, and the substitution of the twenty-second section in its place. By this clause the nullity is confined to marriages where the parties are privy to the irregularity; and it appears, as well by the language of this as of the twenty-third section, that in order to render it void, *both* parties must be affected with the fraud. If the marriage, though not conformable to the mode prescribed, be *bonâ fide* on the part of one or both of the parties, it will be good if solemnized so that it would have been valid before the old Marriage Act.

The first cause of nullity is marrying, knowingly and wilfully, in a place not a church or chapel qualified for the publication of banns.

The law, with respect to the place of solemnization, has been extended by two subsequent Acts. The stat. 5 Geo. IV. c. 32, enacts, that marriages which had been, or should be, solemnized in any place within the limits of any parish or chapelry, licensed by the bishop for the performance of divine service during the repair or rebuilding of the church or chapel, in which marriages had been usually solemnized; or if no such place should be so licensed, then in a church or chapel of any adjoining parish or chapelry, in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by license lawfully granted, should not on that account be questioned.

The statute 6 Geo. IV. c. 92, confirms all marriages which had been solemnized in any church or public chapel erected

(*a*) See Horner v. Horner, 1 Hagg. 355.

and consecrated since the statute 26 Geo. II. c. 33 (*a*); and enacts, that in future marriages may be solemnized in all churches and chapels, erected and consecrated since that time, in which it had been customary and usual before the passing of the Act (July 5, 1825) to solemnize marriages.

In the case of Pertreis v. Tondear (*b*), it seems to have been considered as open to doubt, whether a marriage in the chapel of a foreign ambassador might not be considered as partially exempted from the operation of the former Marriage Act. The ceremony took place in the chapel of the Bavarian ambassador without banns or license: the husband was one of the suite of the Spanish ambassador; the woman had been four months in England, and did not appear to belong to the household of any ambassador. It was argued, that an ambassador's house and chapel were to be considered as part of the country to which he belonged, and that the Marriage Act would not therefore extend to persons residing there. On the other hand, the words of the Act were relied on; and a case of Hienel v. Fierville, 1783, was cited, where it was said that a marriage solemnized in the house of the Venetian ambassador was declared null. Lord Stowell said, it had perhaps never been formally decided that the supposed privilege in ambassador's chapels existed; but if it did, he thought it difficult to bring this case within it, as neither of the parties belonged to the country of the ambassador; and the woman had been in England long enough to acquire a matrimonial domicile, and it did not appear that she had been living in a house entitled to this privilege.

In this case, as well as in that of Ruding v. Smith (*c*), Lord Stowell's opinion seemed to incline in favour of the privilege; but whatever rule might be deduced from a consideration of general international law, it would be difficult on any such grounds to establish an exception to the positive expressions of the Marriage Acts. On the other hand, it is to be observed, that if this privilege did not exist, it would lead to the conclusion, that persons solemnizing marriages in those chapels are liable to prosecution for felony. Under the present Act, the

(*a*) By the statutes 44 Geo. III. c. 77, and 48 Geo. III. c. 127, marriages which had been solemnized in churches and chapels not within the stat. 26 Geo. II. c. 33, were confirmed.

(*b*) 1 Hagg. 136.

(*c*) 2 Hagg. 386.

clause of nullity applies only where the parties knowingly and wilfully intermarry in a place not a church or chapel, wherein banns may be lawfully published; and if, therefore, the parties acted *bonâ fide*, it would probably be held that the case did not come within that clause; and if so, the validity of the marriage would depend on the general law prevailing before the old Marriage Act.

The second ground of nullity under the present Act, is knowingly and wilfully intermarrying without a due publication of banns, or license from a person having authority to grant the same.

Under the former Act, 26 Geo. II. c. 33, it was held that the banns must be published in the true names of the parties; for though this was not expressed, it was implied in the direction, that the true christian and surnames were to be notified to the minister (*a*). A publication of banns with false names was, therefore, held to be no publication at all; and as the eighth section made void marriages solemnized without banns or license, it was held that when the marriage took place upon a publication of banns in false names, it was absolutely void, without reference to the age of the parties or the object of assuming the name (*b*). And if, instead of making use of an entirely false name, the real name was varied so as to disguise its identity nearly as much as a total change would do, the misnomer was for the same reason fatal, from whatever cause it might have arisen (*c*).

A name acquired by reputation only, has been held to be the true name within the meaning of the statute (*d*). And this is the rule which governs the case of illegitimate children, who have no surname, except what they acquire by repute, though usually designated by the name of the mother (*e*): the name by which they are usually known is that which should be used in the publication of banns (*f*). In one case, Lord Stowell

(*a*) King v. Billingshurst, 3 M. & S. 250. Pougett v. Tomkins, ibid. 262. 2 Hagg. 142. 1 Phill. 499. (*b*) Frankland v. Nicholson, 3 M. & S. 259. Mather v. Ney, ib. 265, and see 2 Hagg. 254.

(*c*) 2 Hagg. 254. (*d*) King v. Billingshurst, 3 M. & S. 250. King v. Burton upon Trent, ib. 537. Mayhew v. Mayhew, ib. 266. 2 Phill. 11. Wilson v. Brockley, 1 Phill. 132, and see 3 M. & S. 260.

(*e*) Wakefield v. Wakefield, 1 Hagg. 394. 1 Phill. 134, *n*. See 2 Hagg. 253. (*f*) Sullivan v. Sullivan, 2 Hagg. 238. 3 Phill. 45. Wilson v. Brockley, 1 Phill. 132.

observed, that an illegitimate child might, at different times and places, pass under a variety of names, so as to arrive at a marriageable age, without being possessed of any name clearly ascertainable as belonging to her. He thought that such a case would not be within the statute, as the party being without a true name, a literal compliance with the law would be impossible; and the marriage of such a person might be judged of upon the footing of the old canon law, under which such a defect in the banns would not impair its validity. The case before him approached, in its circumstances, very nearly to the case put; the name used in the banns was the name of the party's mother, by which she had been baptized, and which she had used upon various occasions: and though several other names had been assumed, Lord Stowell thought that this was not so clearly demonstrated to be an untrue name, if she did possess a true name, as to warrant him in declaring the marriage void (*a*).

In cases where the publication of banns takes place in names partially altered from the true names, and where the variation is not so important that it must necessarily deceive, or where "the disguising effect of the variation does not appear on the very face of the name," different considerations were applied. Such variations may be in different degrees from different causes, and with different effects; and the Courts, though not inclined to encourage a dangerous laxity, would not disturb honest marriages by a pedantic strictness. If, without any design of fraud, there had been an accidental mistake of this description, the marriage was not vitiated by it. But if the erroneous publication was known to the parties, and intended by them to deceive a third person, as the father or guardian, the strict letter of the law was enforced; and the alteration of name, though not in itself sufficient to avoid the marriage, was held fatal when originating in such a fraudulent design. The Court, it was said, would hold against the party, that what he intended to be sufficient to disguise the name, should be so considered as against him (*b*). The question, therefore, in these

(*a*) Wakefield v. Wakefield, 1 Hagg. 394. 1 Phill. 134, n. and see Mayhew v. Mayhew, 3 M. & S. 266.

(*b*) See 2 Hagg. 255. The principles applied by the ecclesiastical courts to these cases seem to have proceeded rather upon views of natural equity than upon a strict interpretation of the statute. The clause of nullity applies only to marriages without publication of banns. The only

cases was, whether the partial misnomer was casual or fraudulent. It was open to explanation; if none was offered, the Courts, in general, inferred that the variation was not *bonâ fide:* but if the explanation given, by tracing the error to causes perfectly innocent, protected it from the imputation of fraud, the publication was recognised as a due publication. If the explanation left it doubtful what was the intention, evidence of general fraud might be let in, for the purpose of illustrating the intention with which the inaccurate designation was resorted to (*a*). But since the Court is precluded by the statutes (*b*) from receiving evidence of the non-residence of the parties in the parish in which the publication took place, it seems that that fact is not admitted to be pleaded, even with the view of proving a fraudulent intention (*c*). It is to be observed, that in cases of this description, where a fraudulent design formed one of the ingredients, the question did not arise if there was no person whose rights could be affected by the fraud, as in the case of both parties being of age, and aware of the circumstances, and there being no impediment to the marriage (*d*). But it seems that even if there were no person competent to object to the publication of banns, and if there could, therefore, be no design of eluding observation, still if a varied name was assumed by one party, with the view of imposing upon the other, the marriage might be successfully impeached by the injured party, on the ground of this fraudulent misnomer (*e*).

In cases of a partial variation of name in the banns, an in-

inquiry, therefore, is, whether that which has taken place is publication of banns, depending, therefore, only upon what has been done, and not upon the intention with which it has been done. The rules, thus applied, have naturally led to the idea, that the intention of fraud may be stronger evidence of the insufficiency of the publication as against the guilty party, than it would be as against the innocent one; and that the decision may, therefore, vary according as the one or the other is plaintiff. See Poynder on Marriage, p. 33. Yet it is plain that, under the statute, this can make no difference.

(*a*) Pougett v. Tomkins. Sullivan v. Sullivan, *ub. sup.* (*b*) 26 Geo. II. c. 33, s. 10. 4 Geo. IV. c. 76, s. 26. (*c*) Tree v. Quin, 2 Phill. 14. See 2 Phill. 104. 2 Hagg. 147. (*d*) See Mayhew v. Mayhew, 3 M. & S. 266. 2 Phill. 11. It is not mentioned in the latter report, that the woman had been generally known by the name used in the banns. (*e*) Heffer v. Heffer, 3 M. & S. 265, Fellowes v. Stewart, 2 Phill. 238. 257.

tention of fraud has, in general, been alleged; and it is not, therefore, easy to collect what degree of variation would be deemed so material as to invalidate the marriage, if unattended by circumstances of fraud. It has, however, been decided, that the addition of a final *s* (*a*), or the omission (*b*) or the interpolation (*c*) of a christian name, would not in itself be fatal. On the other hand, it appears to have been considered that alterations of the surname from *Meddowcroft* to *Widowcroft* (*d*), and from *Longley* to *Long* (*e*), so far varied the substance of the name as to be alone sufficient to annul the marriage. In other cases, where sentences of nullity have been pronounced, from partial alterations of the name, attended with circumstances of fraud, it was not necessary to decide whether the misnomer alone would have been followed by the same result (*f*).

These were the principles which governed the decisions in cases of nullity of marriage from publication of banns in false or varied names, while the statute 26 Geo. III. c. 33, was in force. Under the statute 4 Geo. IV. c. 76, the clauses requiring the notification of the true names to the minister, remain the same: and this statute must, therefore, in the same way as the former, be held to intend that the true names shall be used in the publication of banns; but a defect in this particular will not be fatal, unless it appears that the parties knowingly and wilfully intermarried without a due publication. The parties will, therefore, be relieved from the penalty of nullity, where a wrong name is used by mistake, or where the misnomer is occasioned by one party, without the knowledge of the other. Thus, cases where a false name is assumed by one party, with a view of imposing on the other, will not come within this section.

It is to be observed, that the former statute rendered the marriage void, if had without publication of banns; the expression in the present is, "without *due* publication." A publication in false names, or in names fraudulently varied, was

(*a*) Dobbyn v. Corneck, 2 Phill. 102. (*b*) Pougett v. Tomkyns, 3 M. & S. 262. 2 Hagg. 142. 1 Phill. 499. (*c*) Sullivan v. Sullivan, 2 Hagg. 238. 3 Phill. 45. Heffer v. Heffer, 3 M. & S. 265. 2 Hagg. 255, *n*. Green v. Dalton, 1 Addams, 289. (*d*) Meddowcroft v. Gregory, 2 Hagg. 207. 2 Phill. 365. (*e*) —— v. Longley, 1 Phill. 148, *n*. (*f*) Wyatt v. Henry, 2 Hagg. 215. Stanhope v. Baldwin, 1 Addams, 93.

brought within the former statute, as being held to be no publication at all. Perhaps a slighter variation, wilfully resorted to, may come within the present statute; as it may be contended, that a publication of banns may take place under circumstances making it an *undue* publication, though not amounting to so wide a departure from the proper form as to warrant the courts in holding it to be no publication.

It is possible, also, that cases may arise under the present act, where other irregularities (distinct from any variation of the names) may be practised in the mode of publishing the banns, which may be considered to render it an undue publication. However, no objection can be made on the ground of non-residence in the parish in which the publication took place (*a*).

It was in one case made a question, whether a marriage be invalid if the banns be published in one parish, and the solemnization takes place in another (*b*). The two statutes are alike on this point, both directing that the marriage shall be solemnized where the banns have been published, and in no other place; but not in terms enforcing this direction by the clause of nullity. If the parties be resident in the parish where the publication takes place, it is a due publication, and though the marriage be solemnized in the wrong parish, it is not within the clause of nullity, if it takes place in a church or chapel properly qualified. But if the parties be not resident in the parish where the publication takes place, the question would be, whether the irregularity would be protected by the 26th section: That section applies to cases where there has been a solemnization under a publication of banns, and it may be doubted whether it would apply to a case where the banns as published did not authorize the solemnization.

The nullity arising from the want of a license, by the present act, is confined to cases where the parties knowingly and wilfully intermarry without a license from a person or persons having authority to grant the same. Under the former act, which did not contain the words knowingly and wilfully, it was doubted whether want of authority in the person granting the license would annul the marriage, if no fraud was contem-

(*a*) 4 Geo. IV. cap. 76, sec. 26.

(*b*) Stallwood v. Tredger, 2 Phill. 287.

plated by the parties (*a*). Under the present act, this question cannot arise; and if a case should happen of a license being purposely procured from a person not duly authorized, the clause would apply. It would also apply to a marriage by a forged license. A misdescription of the persons, a variation in the name, where there is no doubt about the identity (*b*), or the use of an assumed name by which the party is commonly known (*c*), will not vitiate the license. But there may be a degree of fraud in the description which would have that effect (*d*), and which, it seems, would be fatal to the validity of the marriage; for unless the description in the license can be shown to apply to the parties who were married, the case must be considered as that of a marriage between two persons under a license granted to two others, and this would be the same as a marriage without license, there being no license for that marriage.

In one case, an alteration was made in the license by the parties, before the marriage, correcting the spelling of the name, by changing it from Ewen to Ewing: this was held not to affect the marriage (*e*).

The other cause of nullity, under the present act, is knowingly and wilfully consenting to or acquiescing in a solemnization of the marriage by a person not in holy orders. The act does not apply to cases where the marriage is solemnized by a layman, pretending and supposed by the parties to be a clergyman: the validity of the marriage, under such circumstances, will depend upon the law prevailing before the Marriage Act.

The objection to the validity of marriages duly solemnized according to the laws of a foreign state, to which the parties have resorted in order to avoid the legal restraints existing in their own country, though apparently sanctioned by Lord Mansfield (*f*), has not prevailed either with respect to marriages in Scotland, or with respect to marriages in other places out of England (*g*); and there does not appear to be any ex-

(*a*) Balfour v. Carpenter, 1 Phill. 204. (*b*) Ewing v. Wheatley, 2 Hagg. 175. (*c*) Cope v. Burt, 1 Phill. 224. King v. Burton upon Trent, 3 M. and S. 537. (*d*) Ewing v. Wheatley. (*e*) Ibid. (*f*) Robinson v. Bland, 2 Burr. 1077. 1 W. Black. 234. (*g*) Harford v. Morris, 2 Hagg. 423. See p. 428, and see 2 Hagg. 414. Ambl. 404. Harg. Co. Litt. 79, b. *note* 1.

ception to the rule, "that a foreign marriage, valid according to the law of the place where celebrated, is good every where else (*a*)."

And the converse of this rule will in general hold. Thus, in Scrimshire v. Scrimshire (*b*), Middleton v. Janverin (*c*), and Lacon v. Higgins (*d*), marriages of English subjects abroad, celebrated according to the foreign ceremonial, but which, from being irregular or clandestine, were void under the foreign law, were also held to be void in this country. But the principle, that a question of the nullity of a foreign marriage between British subjects is to be governed by the *lex loci*, is subject to some exceptions.

Marriages in British factories, and in chapels of British ambassadors abroad, have by a late statute (*e*) been declared valid, and before that time they were sometimes considered as forming an exception to the general rule. In Ruding v. Smith (*f*), Lord Stowell stated, that marriages in English factories abroad are regulated by the law of the original country, to which they are still considered to belong. Practice had in several instances established the principle, that the general law of a country should circumscribe its own authority in this matter, and where the practice was admitted, it was intitled to acceptance and respect. It had sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign countries to which they belonged. His Lordship was not aware of any judicial recognition upon the point, but the reputation which the validity of such marriages had acquired, made such a recognition by no means improbable, if such a question were brought to judgment (*g*). He thought, that if such a practice had been sanctioned by long acquiescence and acceptance of the one country, which had silently permitted such marriages, and of the other which had silently accepted them, the Courts of this country would not incline to shake their validity upon large and general theories, encountered as they were by numerous exceptions in the practice of nations.

It will be observed, that these remarks in favour of the validity of such marriages, rest in a great measure on the supposition of their being sanctioned by the law or the practice of

(*a*) 2 Hagg. 390. (*b*) Ibid. 395. (*c*) Ibid. 437.
(*d*) 3 Starkie, 178. (*e*) Vid. *post*. (*f*) 2 Hagg. 371.
(*g*) 2 Hagg. 386.

the country where they may be celebrated, and therefore leave it doubtful, whether they could have been supported (before the late statute) if clearly void according to the *lex loci*. In one case Lord Ellenborough said, that marriages in Ambassadors' chapels, if made by the allowance of the foreign state, would be good marriages in those countries; but that, if not a good marriage in the place where it was celebrated, it could not be a good marriage any where (*a*). However, the Lord Chancellor is reported to have given his opinion in the House of Lords, that there was no doubt about the validity of such marriages.

Another distinction was made (before the late statute), with respect to the marriages of British subjects, celebrated in a country in the military occupation of British troops, which were considered to be subject to the English law, in the same manner as marriages in British colonies and settlements. Thus, where an officer of the army of occupation in France was married to an English lady by the chaplain to the forces, Lord Stowell intimated an opinion, that the marriage, though void according to the French law, would be supported here, on the ground that under the circumstances the parties were not French subjects under the dominion of French law (*b*). And it was partly for the same reason, that in Ruding v. Smith, a marriage between two British subjects at the Cape of Good Hope, at the time when that place was occupied by English troops under a capitulation, was held to be valid, though void under the Dutch laws, which were in force there (*c*). The same principle was applied by Lord Ellenborough to the case of a marriage between a soldier serving with the English army in St. Domingo, and an English woman (*d*).

The late statute 4 Geo. IV. chap. 91, recites, that it is expedient to relieve the minds of all his majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing abroad within the country to the Court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain or officer, or

(*a*) 10 East, 286. (*b*) Burn v. Farrar, 2 Hagg. 369. (*c*) Ibid. 387. (*d*) King v. Brampton, 10 East. 282.

other person officiating under the orders of the commanding officer of a British army serving abroad; and it then enacts and declares, that all such marriages as aforesaid, shall be deemed and held to be valid in law, as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law.

It was considered previously to this statute, that the supposed privilege of Ambassadors' chapels, would only extend to cases where both the parties were subjects of the country of the Ambassador (*a*); but the expressions of the enacting part of the statute apply, whether the parties are, or are not, British subjects. With respect to marriages within the lines of a British army abroad, it supplies defects arising from the non-observance of any forms, or from the want of a clergyman: but marriages in factories or Ambassadors' chapels, not performed by clergymen of the church of England, are left in the same situation as before (*b*).

It was intimated by Lord Stowell, in Ruding v. Smith, that where a compliance with the regulations established in a foreign country was impossible, the necessity of the case might exempt it from the operation of the *lex loci*. If from legal or religious difficulties the ceremony could not take place according to the law of the country, the law of England did not (as he conceived it) say that its subjects should not marry abroad (*c*). The case before him, he thought as nearly entitled to the privileges of strict necessity as could be: the husband had attained the age of twenty-one years, but being under thirty the consent of his father was required by the Dutch laws prevailing at the Cape:

(*a*) See Pertreis v. Tondear, 1 Hagg. 136.

(*b*) By another statute passed in the same session (4 Geo. IV. chap. 67), reciting, that the British factory at St. Petersburgh was, by a manifesto of the emperor of Russia, declared to be abolished from the 20th of June 1807, it is enacted that all marriages (both or one of the parties thereto being subjects or a subject of this realm) that have since the 20th of June 1807, been solemnized, or that shall hereafter be solemnized at St. Petersburgh, by the chaplain to the Russia Company, or by a minister of the church of England, officiating instead of such Chaplain in the said chapel of the said Russia Company, or in any other place before witnesses, shall be as good and valid in law, and so deemed in the United Kingdom of Great Britain and Ireland, and the dominions thereunto belonging, as if the same had been solemnized before the abolition of the said factory.

(*c*) 2 Hagg. 391.

the wife was a minor without any legal guardian: and one of the grounds of decision was stated to be the insuperable difficulty of obtaining any marriage according to the Dutch law (*a*).

If the law of the foreign country imposed any highly unreasonable restraints upon marriage, it might perhaps be held in England, that the marriage of British subjects in a manner conformable to the general law of England was valid. Thus, in Ruding v. Smith, Lord Stowell puts the case of a foreign law, fixing the period of majority at an advanced period of life, as forty; and suggests that it would be a question, whether the marriage of two British subjects, not absolutely domiciled abroad, should be invalidated on that ground.

Another distinction has in some cases been taken, with respect to the marriages of British subjects in foreign countries, in which their residence has been only temporary, without an *animus morandi*. Though it is clear, that such marriages, if conformable to the foreign law, are good, yet it seems questionable how far the converse of this proposition is true. In Harford v. Morris (*b*), it was stated to be clear, that a transient residence, by coming one morning and going away the next, was not such a residence as to make the *lex loci* applicable, and the marriage there was confirmed, though void according to the law of the country where it was celebrated (*c*). This opinion is of less weight from the sentence having been reversed (though the reversal was upon other grounds), and it is certainly contrary to the doctrine of the cases of Scrimshire v. Scrimshire, and Middleton v. Janverin, as well as to the doctrine attributed to Lord Hardwicke, in Butler v. Freeman (*d*): it is, however, favoured by several of the remarks which fell from Lord Stowell, in the above mentioned case of Ruding v. Smith. In that case his Lordship was of opinion, that the character of the husband, the circumstance of his not being a settler, but a military servant of the British government, coming

(*a*) The statute 57 Geo. III. chap. 31, cited *ante*, p. 459, declaring void marriages in Newfoundland not solemnized by clergymen, excepts marriages that may be had under circumstances of peculiar and extreme difficulty in procuring a person in holy orders to perform the celebration, and in which the law might on that account otherwise determine on the validity of such marriages.

(*b*) 2 Hagg. 423. (*c*) Ibid. 431. (*d*) Amb. 303.

into the country, not to purchase, to sue, or to live there, but in the prosecution of a further voyage directed by British authority, ought to operate in favour of exempting him from the restrictions of the *lex loci* (*a*).

But, if for these reasons the marriages of British subjects temporarily resident in foreign countries be privileged, the privilege will, it seems, be forfeited by the parties voluntarily resorting to the *lex loci*, and will not support a marriage which is solemnized according to the foreign ceremonial, but which, as being clandestine, is void under the foreign law. On this ground Lord Stowell reconciled the opinions which he expressed in Ruding v. Smith, with the decisions in Scrimshire v. Scrimshire, and Middleton v. Janverin (*b*). When the parties have recourse to the form of solemnization established in the country in which they are, their mutual intention must, it has been said, be presumed to be, that it should be a marriage or not, according to the laws of that country (*c*).

It is to be observed, that in all the instances in which the marriages of British subjects, celebrated abroad, in a manner not conformable to the *lex loci*, are considered valid by the English courts, either upon general principles, or by virtue of legislative enactments, it is a different question whether they are also valid in the country in which they took place, and in other foreign countries; the decision of that question must of course depend in each case upon the law of the particular place in which it may happen to be raised. And hence it is, as Lord Stowell observes, always the safest course to solemnize the marriage according to the law of the country (*d*).

British subjects residing in British settlements abroad, are governed by the laws of England, excepting where alterations have been introduced by express enactment. Hence, their marriages are regulated by the English law, which, with respect to marriages beyond the seas, is the same as before the statute 26 Geo. II. chap. 33. Thus, a marriage between two British subjects, celebrated at Madras by a Roman Catholic priest in a private room, was held to be valid (*e*).

The statute 58 Geo. III. chap. 84, confirming marriages celebrated in the British territories in the East Indies, by

(*a*) 2 Hagg. 389. (*b*) See 2 Hagg. 393. (*c*) 2 Hagg. 411. 412, and see 2 Phill. 285. (*d*) 2 Hagg. 391. (*e*) Lautour v. Teasdale, 7 Taunt. 830. 2 Marsh, 243.

ministers of the church of Scotland, has been already noticed. The retrospective branch of this statute confirms all marriages which had been thus celebrated, without reference to the religion of the parties. It renders valid future marriages thus celebrated, both or one of the parties being members, or a member of, or holding communion with the church of Scotland, and previously making a declaration in writing to that effect.

No. II.

Dower and Curtesy of Estates subject to Conditional Limitations.

THE question whether the right to curtesy or dower continues after the estate of the wife in the one case, or of the husband in the other, has determined by limitation, or by an executory devise, is one much embarrassed by conflicting authorities. It is ably discussed by Mr. Park (*a*).

It has been seen, that where the husband or wife is seised in fee tail, the right of dower or curtesy continues notwithstanding the determination of the estate of failure of issue. The principle on which the estate is thus prolonged beyond its natural expiration, is, as Mr. Butler remarks, at this period, rather to be guessed at than demonstrated. The reason assigned in Paine's case, is, that dower and curtesy being the legal incidents of an estate in fee, are considered to be tacitly implied in the grant of that estate (*b*).

But in cases where the estate determines by entry for a condition broken, or by reason of a defective title in the grantor, it has been seen that the right to dower or curtesy is also defeated.

Where the estate by the original grant or devise creating it, is to continue till some specified event shall happen, it seems that dower or curtesy will not continue after that event has happened. Thus, where land or rent is granted to one and his heirs till the building of St. Paul's shall be finished, if the event happens, dower shall cease (*c*). The case of a rent reserved on an estate tail, which determines by failure of issue, is an instance of the same kind (*d*). So if a rent be granted, with condition to cease during the minority of the grantee's heir, the wife of the grantee will be endowed of the rent with a *cesset executio*, during the minority of the heir (*e*).

(*a*) Treatise on Dower, p. 168. See also Butl. Co. Litt. 241, a. *note* 4, and *ante*, vol. 1, p. 38, *et seq.* p. 375, *et seq.* (*b*) 8 Co. 68. 71.
(*c*) Jenk. p. 5, Cent. 1, Case 6. (*d*) Ibid. and Co. Litt. 30, a.
(*e*) Jenk. p. 4, F. N. B. 149, *note*. Perk. 327. 10 Mod. 367. See also Park on Dower, p. 162. Preston on Abstracts, vol. 3, p. 373. *Contra* Butl. Co. Litt. 241, *a. note* 4.

It appears, therefore, that in all cases of estates governed by the rules of the common law, the right to dower or curtesy was only co-extensive with the duration of the estate, with the exception of the case of an estate tail determining by failure of issue. But upon the introduction of conditional limitations by way of use and executory devises, it became a question whether dower or curtesy should cease when the estate was determined by either of these modes. Upon principle, it would seem that the decision of this question ought to be guided by analogy to the general rule of the common law, and not by analogy to the excepted case of an estate tail. If the principle of that exception be that which is stated by Lord Coke, it can have no application to an estate determined by conditional limitation. If dower and curtesy be tacitly implied in the gift of an estate tail, they are enjoyed after failure of issue as part of that which is granted. But the conditional limitation destroying the estate, defeats the whole of that which is expressly granted. It would be singular, if that which is included in the grant by implication only, could be preserved (*a*). Mr. Preston observes, that "the cases of dower of estates determined by executory devise and springing use, owe their existence to the circumstance, that those estates are not governed by common law principles: and when the limitation over was allowed to be valid against the former donee, it was on the terms that the limitation over should not impeach the title of dower of the wife of that donee (*b*)." And if it be the rule, that dower and curtesy are exempted from the operation of limitations of this description, it probably originated in some indulgence shown to these interests, at the period when the validity of such limitations was established. But it will be seen that the supposed rule rests on very doubtful grounds.

The case of Flavill v. Ventrice (*c*), was not decided, the judges being divided upon the question, whether dower was defeated by a shifting use. The case of Sammes v. Payne (*d*), decided only that curtesy continued after the expiration of an estate tail by failure of issue, and though some conflicting dicta are to be found in the reports of that case, the comparison of them made by Mr. Park, shows that no certain result can

(*a*) See Park on Dower, 185. (*b*) Abstracts, vol. 3, p. 373.
(*c*) 9 Vin. Ab. 217. (*d*) 1 Leon. 167. 8 Co. 67. Goldsb. 81. 1 And. 184.

be deduced from them. In Buckworth v. Thirkell (*a*), the question was decided in favour of the continuance of curtesy. That decision has generally been much questioned (*b*). It is, however, said to have been followed by a case of Goodenough v. Goodenough, mentioned by Mr. Preston; this case has been shortly noticed by Dickens (*c*): the following statement of it is extracted from the Register's Book (*d*).

R. Serle devised certain estates to his nephew William Goodenough and his heirs for ever, subject to the condition and limitation after mentioned; viz. that in case his said nephew should happen to die unmarried, and without issue of his body lawfully begotten, his will was, that the devise and devises thereinbefore made, should in any or either of those cases cease, and be absolutely void; and in that case he gave the estates to his nephew Richard Jocelyn Goodenough.

The testator died, leaving R. J. Goodenough his heir at law. William Goodenough afterwards married the plaintiff, having, first by articles previous to the marriage, agreed to settle lands of sufficient value to secure a jointure of £200 per annum to her for life, with remainder to the issue of the marriage.

By his will he gave his personal estate to the plaintiff, and appointed her executrix, and recited that his brother Richard would have the estates left him after his (William's) death by R. Serle, and as he left them to his brother without any litigation, which there was the greatest room for, he hoped he would have the generosity to pay his wife her dower regularly, and without dispute. He died without issue, leaving his brother his heir at law.

The bill prayed that the plaintiff's jointure might be made good out of the lands devised by Serle, or that she might be endowed out of those lands. It submitted, that the estate of William in those lands became absolute on his marriage; or that, if the devise over was intended to take effect on his dying without issue, then that it was void as being too remote, or that it reduced the estate of William to an estate tail; and, therefore, that the plaintiff was entitled to dower.

(*a*) 3 Bos. and Pull. 652, *note*. 1 Coll. Jur. 332. (*b*) Co. Litt. 241, *a. note* 4. 3 Bos. and Pull. 653. (*c*) Vol. 2, 795. (*d*) 31 Jan. 1772. Reg. Lib. A. 1771, fo. 557.

The defendant R. J. Goodenough, by his answer, insisted that there was no agreement on the marriage of the plaintiff for a settlement of the lands in question; and submitted that she was bound out of the personal estate of her husband, to purchase lands of the value of £200 per annum, upon the trusts of the marriage articles, under which he would become entitled on her death. He submitted, that the executory devise in the will of R. Serle, was intended to take effect on the death of William, unmarried, *or* without issue; and that the testator having coupled those events in the same sentence, the latter must be understood to refer to the death of William, and therefore was not too remote.

The decree declared, that according to the true construction of the will of William Goodenough, the plaintiff was entitled to have dower only out of the estates of which he died seised, and referred it to the Master to take an account of the rents and profits, and to set apart and allot sufficient of the said estates, as and for the dower of the plaintiff therein.

From the language of the decree, referring the plaintiff's right to her husband's will, it is probable that the Court adopted the view submitted by the bill, holding the husband's estate to be absolute; and if so, the decision does not affect the present question.

A case closely corresponding with Buckworth v. Thirkell, has lately occurred, and has received a similar decision in the Court of Common Pleas (*a*). The father of the husband devised to him and his heirs for ever, all his houses, &c. subject to the payment of an annuity; and if the said W. F. (the husband) should have no children, child, or issue, the said estate was on the decease of the said W. F. to become the property of the heir at law, subject to such legacies as he, the said W. F. might leave by will to any of the younger branches of the family. It was decided, that under this devise, W. F. took an estate in fee, with an executory devise over, in the event (which happened) of his dying without issue, to the person who should then be the testator's heir at law (*b*). It then became a question, whether his widow was entitled to be endowed, and a bill having been filed by her for that purpose, a

(*a*) Moody v. King, 2 Bing. 447. (*b*) Doe, *d.* King v. Frost, 3 Barn. and Ald. 516.

case was stated for the opinion of the Judges of the Common Pleas, who certified in her favour. The judgment of the Lord Chief Justice proceeded chiefly upon the authority of Buckworth v. Thirkell, and the supposed authority of Goodenough v. Goodenough; and upon the consideration that, from the nature of the limitations, the case came within the definition of Littleton (*a*), according to which the right to dower exists where the husband's estate is such, that the issue the wife may have by him may inherit (*b*).

These are the authorities in favour of the opinion, that dower and curtesy may continue after the determination of the estate by limitation. On the other hand, it was said in Boothby v. Vernon (*c*), that "wherever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not have curtesy;" and according to one of the reports of Sammes v. Payne, the reason given for the husband's having curtesy of an expired estate tail was, that it was "spent and determined by the dying without issue, and doth not cease, or is cut off by any limitation (*d*)."

The point arose in Sumner v: Partridge (*e*). Land was devised to *A* and her heirs, and if she died before her husband, he to have £20 a year for life, and the remainder to go to her children. The wife died before the husband. The Master of the Rolls treated it as clear, that the husband was not entitled to curtesy; and for this reason, that the mother's estate of inheritance ceased the moment she died, and the children took not by descent, but by virtue of the remainder over: neither a tenant in dower or curtesy could entitle themselves to an estate in dower or curtesy, where the children who were left could not possibly take an inheritance, for the moment of time when the husband takes as tenant by the curtesy the inheritance must *descend* upon the children.

The decision in the case of Ray v. Pung (*f*), materially influences the point under consideration. An estate liable to be determined by a springing or shifting use, is not in substance distinguishable from an estate liable to be determined by the exercise of a power of appointment: the effect is the same,

(*a*) Sect. 53. (*b*) It is understood that this case is still under litigation, and that it will probably come before the Courts again. (*c*) 9 Mod. 150. (*d*) 1 Leon. 168. (*e*) 2 Atk. 47. (*f*) 5 Barn. and Ald. 561. 3 Madd. 310.

whether the new use is to arise on the execution of the power, or on any other uncertain event taking place. In either case it arises from the original instrument, taking effect, in point of time, from the period when the event happens: and since it has been settled that the right to dower is defeated by the appointment, it seems to follow that the same rule must prevail with respect to estates determined by shifting or springing use; and the case of an executory devise must be governed by similar considerations. In the argument of Ray v. Pung, and in the Vice-Chancellor's judgment, the questions were looked upon as nearly the same in substance; and Buckworth v. Thirkell was referred to as one of the main authorities in favour of the widow's right. It does not appear that this analogy was adverted to in the late case of Moody v. King.

With respect to the case of Buckworth v. Thirkell, it may be doubted whether the Court intended to decide generally that curtesy should exist, notwithstanding the determination of the estate by executory devise, or whether it turned upon the particular nature of the limitation. The wife was seised in fee, subject to an executory devise over, in the event, which happened, of her dying under age, and without leaving issue. Hence, if she had left children, they would have been entitled by descent; and the judgment of Lord Mansfield proceeded chiefly (if not entirely) upon the ground that the case, for this reason, came within the definition of curtesy, that the wife had an estate of inheritance, which any issue she might have had by the husband would have inherited, and that that estate continued during her life. The decision of the Court of Common Pleas, in Moody v. King, seems to have been founded on similar reasons; and the case of Goodenough v. Goodenough (if it involved this question) is open to the same distinction. These cases, therefore, (supposing their authority to be admitted) cannot be considered as deciding any thing, except where the death of the husband or wife, without leaving issue, is the event upon which the estate is determinable. Still less do they apply to cases where the limitation depends upon an event which happens during the coverture. To sustain the argument in favour of dower and curtesy in such cases, it would be necessary to contend, that after the estate of the husband or wife had ceased, and the party entitled under the limitation over had entered, the former estate should partially revive upon the determination of the coverture. The doubt in the case of Flavill v. Ventrice did not go to this extent, the

event not having happened till after the husband's death, and though, according to one of the reports of Sammes v. Payne (*a*), this point was put by one of the judges, yet the absence of the passage from the other reports of the case, and the other discrepancies between them, which Mr. Park has pointed out, show that very little reliance can be placed on the authenticity of this dictum.

It may be concluded, that there is no authority for the continuance of dower or curtesy after the determination of the estate by conditional limitation or executory devise, except where it determines by the death of the husband or wife without leaving issue, and that it is still extremely questionable whether that exception can be supported.

(*a*) 1 Leon. 166.

No. III.

Of the Husband's Power over the Wife's future Interests in Choses in Action.

The extent of the husband's power over the wife's interests in choses in action, is a subject on which there has been considerable difference of opinion. The decision in the case of Hornsby v. Lee (*a*), that an assignment of the wife's reversionary interest in a trust fund, made by the husband for valuable consideration, did not bar the wife's right by survivorship, has sometimes been questioned; and it has been supposed that the previous authorities had established the proposition, that the husband might by assignment for valuable consideration bar his wife's right by survivorship to her reversionary choses in action, provided they were such as might possibly have fallen into possession during the coverture. This opinion is supported by the author, who has collected the cases and dicta which appear to sanction it (*b*); his argument has been ably answered by Mr. T. Canning (*c*). In a recent case, not yet reported, (Purdew v. Jackson) the point again occurred, before the same learned judge who decided the case of Hornsby v. Lee: it is understood to have been fully discussed and considered, and the decision was the same as in the former case. It must be admitted that these decisions are contrary to an opinion which had previously been entertained by many members of the legal profession, but a consideration of the subject will show that this opinion is one not easily to be reconciled with principle, and that it has originated in some dicta, to which too extensive a meaning seems to have been ascribed.

A chose in action not being assignable at law, an assignment of it can only be made effectual upon the principles of equity; and it is supported in equity, on the ground that it is an agreement, by which the assignor is bound to give to the assignee

(*a*) 2 Madd. 16, *ante*, vol. i. p. 238. (*b*) *Ante*, vol. i. p. 238, *et seq.* (*c*) Observations on a Case lately submitted to Counsel, &c. By Thomas Canning, Esq. 1820.

the benefit of that which he has assigned. "It is by agreement, in most cases of choses in action, that the assignee takes it. His covenant is, in this Court, a disposition of it, that could be enforced against him; and as against him, at least, would go to the representative of the person agreeing with him (*a*)." Upon principle, therefore, the right of the assignee of a chose in action is derived from his right to call upon the assignor for a specific performance of the agreement between them; giving him no original right, except as against the assignor and his representatives. He is entitled to whatever interest the assignor himself possesses, or is able to procure. If the husband sells the chose in action of his wife, he is bound by his contract to do whatever is in his power for reducing it into the possession of the purchaser; and the right of the purchaser is, therefore, coextensive with the husband's legal power of acquiring the property.

In some of the earlier cases this principle was more rigorously enforced than at present; it was considered, that even if the husband had the power of reduction into possession, unless he actually exercised that power, his wife's right by survivorship could not be intercepted by his agreement. If the husband assigned for valuable consideration a chose in action belonging to his wife, which might have been immediately recovered, it was held that the wife's right by survivorship subsisted, unless the property was actually recovered during the coverture (*b*). The assignment not being effectual at law, it was thought that there was no equity to make it good as against the wife surviving and claiming by title paramount.

But this doctrine seems to have given way to other principles, founded on the general rule, that where there has been an agreement for valuable consideration, the question shall be treated in the same manner as if the agreement had been performed. This rule, obviously just in cases arising between the parties to the agreement, and those claiming under them, has been extended to some other cases, where its justice is less apparent; for some purposes an agreement to do an act, which the party agreeing has it in his power to do, is considered as if actually performed, as against third persons claiming by a distinct title, which might have been defeated by an actual per-

(*a*) 6 Ves. 394. (*b*) Prec. in Chan. 121. 419. Gilb. Eq. Rep. 103. 2 Freem. 241.

formance. This equity, which perhaps originated in a notion that the omission to do the necessary acts for carrying the agreement into effect, was a species of accident from which relief should be given, is exemplified by the cases where agreements for the execution of powers by tenants for life are held binding upon the remaindermen (*a*); and it seems to have been upon similar principles that assignments of the wife's choses in action immediately recoverable, when for valuable consideration, have been held binding on her surviving (*b*). The husband has agreed that the purchaser shall have that which has been assigned; this agreement might and ought to have been performed while he was living, and is therefore treated as if it had been accordingly performed (*c*).

But this principle, whether it was or was not originally well founded (*d*), can have no application to an assignment of a reversionary interest; the husband having no legal power to reduce it into possession, if he dies before it falls in. His agreement to place it in the possession of the assignee, is one that he could not have effectuated; and an agreement which could not by possibility have been performed, cannot upon any principle of equity be treated as if it had been performed. The assignment gives to the assignee such interest as the husband had, and a right to call upon him to render that assignment effectual; but it cannot upon principle give a right to call upon the wife, who is a stranger to the contract, to do that which it was never in the husband's power to do.

The principle that a man cannot by contract give to another an interest which he does not possess, and which he has no means of acquiring, is so obviously just, that it would require strong authority to establish an exception to it.

The case of Atkins v. Dawbury (*e*), is the only instance adduced as a direct decision, that an assignment of a reversionary interest is binding on the wife surviving. It seems, however, not to have been considered as the case of a reversionary interest. The Court said, that though the "legacy was charged on a reversion, which was not an immediate fund for the raising it, yet being given to the wife *in præsenti*, when

(*a*) Vide *ante*, vol. i. p. 123. 180. (*b*) Vide *ante*, vol. i. p. 225. (*c*) 2 Ves. sen. 20. (*d*) See Sugden on Powers, 3d ed. p. 346, and the observations of Sir W. Grant, there referred to. (*e*) Gilb. Eq. Rep. 88. *Ante*, vol. i. p. 244.

the wife comes in, it shall carry interest from the testator's death." The Court gave as one reason for the decision, that the husband had by his will confirmed the assignment, and given the legacy again in the same manner. The wife was his executrix, and if she took any benefit under his will, was of course bound to affirm this bequest. But so far as the decision turned on the effect of the assignment alone, it is clear that it could not now be supported, the assignment having been made without valuable consideration.

The dictum of Lord King, in Chandor v. Talbot (*a*), was uttered in a case in which the legacy assigned became payable during the coverture, and he put the assignment on the footing of an agreement for valuable consideration.

The dicta attributed to Lord Hardwicke, in Grey v. Kentish, and Hawkyns v. Obyn (*b*), favour the opinion that the husband's assignment would be effectual against the wife surviving; but it is to be remarked, that in both cases the decree was in favour of the wife. In the first of these cases, the wife's right to a provision, and her right by survivorship, are confounded in the report, so that it does not appear upon which ground the decree proceeded. In the latter case, the property consisted of the interest of a fund given to the husband and wife for their lives, and the life of the survivor; and it was, therefore, open to considerations different from those applicable to a reversionary interest given to the wife alone.

In Bates v. Dandy (*c*), Lord Hardwicke is reported to have said: "The husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary, but for a valuable consideration; but though he cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money."

Upon this passage the first observation which arises, is that the accuracy of the report cannot be very confidently relied on. The first branch of the sentence implies that the husband cannot assign the wife's term, except for valuable consideration; the second speaks of a bond as if it were different from a chose in action. These mistakes make its authority at least questionable, and as the case itself involved no point relative to a future interest, the expression about the assignment of a pos-

(*a*) Cited *ante*, vol. i. p. 243. (*b*) Ibid. (*c*) 2 Atk. 208.

sibility can, at most, have only that degree of weight which belongs to extrajudicial dicta.

But if any inferences can be drawn from these remarks, they stand opposed to other cases before the same judge, in which the point is more explicitly adverted to.

In Bush v. Dalway (*a*), (which was subsequent to these three cases) the question related to a portion secured to the wife, payable on her surviving her father. Lord Hardwicke says, "A question was made, whether the husband had a right to assign it in the father's life; which is not necessary here, although I think he might not. In Theobald v. Duffoy, before Lord Macclesfield, an assignment by husband and wife of the wife's executory interest was held good. There the wife had something more than in this case; but that turned on her joining, on which foundation the Court determined it for the purchaser, which was affirmed by the Lords. Here, before the father's death, he had no right of action at all, but afterwards he might have called for it immediately (*b*)." This is a clear expression of opinion, directly applying to the point under discussion.

The question in the cause was, whether the wife's right to this portion was bound by her marriage settlement, by which the husband had covenanted that it should be settled upon certain trusts: and it was held to be bound, on the ground that the father having died during the coverture, the husband became immediately entitled. "Perhaps," said Lord Hardwicke, "the event might have happened, that she would not have been bound, as if the right of action never had vested in the husband; but here it did, by his surviving the father." The question, he added, depended on the general rule, that what ought to be done was considered in equity as done, and this ought to have been done, (i. e.) the covenant ought to have been performed in the life of the husband (*c*).

(*a*) 1 Ves. sen. 19. 3 Atk. 530.

(*b*) 1 Ves. sen. 20. The report in Atkins contains similar expressions, with this addition, "but it has been frequently determined that a husband may assign a wife's chose in action for a valuable consideration; but what does that turn upon? Why, upon the husband's right to sell." There is probably some inaccuracy in the latter part of this passage; Lord Hardwicke would have given some better reason. According to both reports, he appears to have been distinguishing between present and future interests.

(*c*) It is stated in Hornsby v. Lee, that the reversion fell in a short

So in Medcalfe v. Ives (*a*), where a man, by a settlement previous to his marriage with the infant daughter of a freeman of London, in consideration of a portion, covenanted with the father to release her customary part, Lord Hardwicke said: "As to the objection of the customary part being a possibility, and merely a contingency, it is of no weight, for there is no doubt but it might be released in equity; but here is a covenant, which the defendant is bound by in all events, and it is no objection to say the wife was under age; for though, in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share as a chose in action not recovered or received by the husband; yet he being alive, it is a matter that accrues to him in right of his wife, and he may release it, and his release will bind her, and therefore it was reasonable he should perform his covenant."

In these two cases the covenants were entered into before the marriage, but it is obvious that such a covenant is equally binding on the husband whether made before or after; and so far as its effect depends upon its being the agreement of the husband, it must be equally binding.

The grounds of the decision in the case of Theobald v. Duffoy (*b*), alluded to above, in which an assignment by the husband and wife of a possibility of a term, not assignable at law, was supported in equity as an agreement for valuable consideration, also furnish an illustration of the law on this subject. The judgment did not rest upon the circumstance of its being the husband's act: there is no intimation of the husband being competent, alone, to bind future interests of his wife not assignable at law: it turned on the fact of the wife having joined, with the assent of her friends, proceeding, on the notion adopted in many early cases, that agreements entered into by married women or infants, if fair and reasonable, might be enforced in equity.

time before the death of the husband. The interest had, therefore, ceased to be reversionary; and it might have been contended, upon the principle laid down by Lord Hardwicke, that the fund having come into the power of the husband, ought in his lifetime to have been received and paid to the person to whom he had assigned it; and that it should, therefore, be bound by the assignment. But this point does not appear to have been noticed.

(*a*) 1 Atk. 63. (*b*) 9 Mod. 101.

In another case (*a*), it was laid down by the Lord Chancellor, that the husband had no power whatever to release a future right of his wife's; that she might survive him, and would then be entitled to it in her own right. The facts were, that the wife's father, being a freeman of London, the husband after the marriage, in consideration of £100, released the wife's customary part: he survived the father, and the release was ultimately held to be a bar. The husband being alive at the time when the interest in question fell in, the decision was consistent with the opinion expressed at first; it seems also to have turned partly on the fact of the wife having agreed to, or joined in the release (*b*).

The cases of Hewitt v. Crowcher, and Gregg v. Crowcher (*c*), in which the consent of the wife was taken to a sale of her reversionary interest in a trust fund, seem to belong to that class of cases in which the Court of Chancery sometimes allowed the wife's consent to be given, considering its effect to be analogous to that of a fine at law. This practice was considered in Sperling v. Rochford (*d*), Richards v. Chambers (*e*), and Pickard v. Roberts (*f*), and proceeded upon the supposition that the property was not in the power of the husband, and that it could not be affected, except by a decree founded on the wife's consent: it was considered that the wife's right, in the event of her surviving, was barred by force of the consent and the decree, and not by the husband's assignment. Such cases, therefore, tend to show the limited extent of the power which the husband was supposed to have.

It is most probable that the wife's consent was received by Lord Alvanley, in Gregg v. Crowcher, and Hewitt v. Crowcher, for this purpose, and not for the sole purpose of waiving her equitable right to a provision. In his Lordship's opinion, "no interest of hers will be bound but by her consent, not taken by the negotiation of friends, but by the Court itself (*g*)." In Woollands v. Crowcher (*h*), where these cases were produced in argument, they were understood in this light: it was said, that the consent was to be taken by analogy to a fine, and that without it the wife would not be bound. The Master of the

(*a*) Kemp v. Kelsey, Prec. in Chan. 544. 594. 2 Eq. Ca. Ab. 967.
(*b*) Prec. in Chan. 496. (*c*) Cited *ante*, vol. i. p. 243.
(*d*) 8 Ves. 164. (*e*) 10 Ves. 580. (*f*) 3 Madd. 384.
(*g*) 4 Ves. 18. (*h*) 12 Ves. 417.

Rolls (Sir W. Grant) also considered the question to be, whether the wife's right by survivorship should be barred by allowing her consent to be taken. "But in this instance," he says, "the object is not to bar her equity to have a settlement, but to bar her right to survivorship, for upon his death it belongs to her entirely. She is giving up not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right to convey, let him exercise his right. But why this Court should join and aid him for this purpose I do not know." On a subsequent day his Honour said that he should take the consent *de bene esse*; the principle upon which this was done does not distinctly appear from the short note of the judgment; but it may be collected that his Honour's intention was to receive the consent without prejudice, leaving open the question whether the wife would be bound by it if she survived: he observed that the effect of an assignment of reversionary property had been doubted, and referred to Saddington v. Kinsman (*a*).

In the case of Howard v. Damiani (*b*), which occurred subsequently before the same learned Judge, and which was heard by consent, the decree was most probably made with the same view as that in Woollands v. Crowcher: it did not in terms absolutely confirm the sale, directing only that the trustees should be at liberty to make the transfer.

In another case before Sir W? Grant, it was said by Sir S. Romilly, in argument (probably referring to Richards v. Chambers), that his Honour had decided that the husband could not assign his wife's reversionary interest: he interposed, saying, "That is if it could not fall into possession during his life, as a reversion upon his own death; not if it depended upon an event that might happen during his life (*c*)." This may be thought to imply, that in the latter case he might assign it; but the remark was obviously made only to correct an erroneous reference to Richards v. Chambers, that case applying only to reversions expectant upon the husband's death, and not affecting the question as to other future interests. His Honour's observation, in another case, that the husband can dispose of his wife's property in expectancy against every one but her

(*a*) 1 Bro. C. C. 44. (*b*) 2 Jac. & Walk. 458. (*c*) 16 Ves. 122.

surviving (*a*), is certainly an authority against the opinion that he has an unqualified power of assignment.

It may be observed, also, that at the time when Lord Hardwicke is supposed to have intimated an opinion in favour of the husband's power of assigning, the effect of his assignment for valuable consideration was in other respects not settled as at present. It was then doubtful whether it barred the wife's equitable right to a provision; the reasoning which has led to the doctrine now established, that such an assignment does not defeat the wife's equity, applies equally to the present question. "It would be whimsical then," says Lord Alvanley, "that the assignment by the husband for valuable consideration should put that assignee in equity in a better situation, than the husband himself is in at law (*b*)."

One argument in favour of the husband's power to bind the future interests of his wife by assignment for valuable consideration, is founded on the power which he is supposed to possess of binding such interests by his release. But if the supposition were clearly right, it would be difficult to maintain any very close analogy between a power of assigning for a consideration, and a power of releasing without any; and still more difficult to show that the right to assign must be co-extensive with the power to release. Many cases may be put in which a release will operate at law upon that which the party could not assign, as in the case of the release of a bond previously assigned, a release by one of two partners, or by the husband of a feme executrix. If the rules of law enable a party, by his release, to pass a greater interest than he possesses, it does not follow that equity must give a similar extension to his power of contracting, or interfere to effectuate his attempt at alienation, invalid at law, and purporting to affect what does not belong to him.

It may, however, be doubted, whether the husband has even at law a general power of releasing the future rights of his wife.

In Thomson v. Butler (*c*), an annuity had been granted to the wife for her life: the husband by deed, in express terms reciting the annuity, released it. The wife having survived him, brought a writ of annuity: the release was pleaded, but

(*a*) 1 Ves. & B. 405. (*b*) 4 Ves. 19. (*c*) Moore, 522. The case is reported on another point in Cro. Eliz. 721.

was held to be no bar, because the husband's release could not extinguish the annuity of the wife, but if she survived she should have an action for it. This was a case of personal property, the writ of annuity being a personal remedy only (*a*).

To this decision, the opinion of Lord Holt, in Cage v. Acton (*b*), is opposed; a case, however, in which his opinion does not possess the high authority usually attached to his name, his judgment upon the principal point in question having been more than once overruled, and the reasoning by which he supported it having been characterised by Lord Kenyon as merely flimsy and technical (*c*). His opinion was, that any right or duty, which by possibility may accrue due during the coverture, may be released by the husband. He admitted, however, that a right or duty which could not accrue during the coverture could not be released by the husband, according to the cases of Clark v. Thompson (*d*), Smith v. Stafford (*e*), and Lupart v. Hoblyn (*f*), from which it appeared, that a covenant or promise made by a third person before the marriage to pay a sum of money to the wife, in the event of her surviving the husband, could not be released by the latter. And the proposition, that a legal right which cannot accrue during the coverture is not releasable by the husband, seems to be well settled: it is difficult, however, to find any principle for this admitted limitation of the husband's power of releasing, unless it be, that in this case the interest and the right of action cannot vest in him. And if this be the principle, it seems to follow, that the effect of his release depends upon his having an interest or right of action; and, therefore, that it will not operate beyond the extent of his interest, if no right of action ever vests in him.

In the case of a future covenant, e. g. a covenant to pay money at a future period, a release does not operate as a release of the right of action, none having arisen; and a release of all actions not discharging a covenant which has not been broken (*g*). The reason why it may be released by express words, is said to be, that it is a covenant *in esse* (*h*), though

(*a*) See Co. Litt. 144, *b*. (*b*) 1 Salk. 325. 1 Lord Raym. 515. 12 Mod. 288. Comyn. 67. Carth. 511. Holt, 309. 1 Freem. 512. 515, *ante*, vol. i, p. 238. (*c*) 5 T. R. 384. (*d*) Cro. Jac. 571. (*e*) Hob. 216. Hetl. 12. (*f*) 1 Sid. 58. (*g*) Co. Litt. 292, *b*. (*h*) 10 Co. 51, *b*.

the performance be future, and that the release discharges the present obligation and force of it (*a*). But if the husband's release operated in this manner, its effect would apply equally to every future covenant made to his wife. Whether the covenant be for payment of money on the death of the husband, or on the death of a third person, it is equally a covenant *in esse*, and its present obligation and force is the same. And it would therefore follow [as it was contended in Smith v. Stafford (*b*)] that the husband might release a covenant, or promise, which could not take effect in his lifetime: but it has been held that he has not that power.

In the case in Rolle (*c*), it was said that the husband might release a legacy payable to his wife at a future day, because he had an interest in it before the day of payment, which interest it was clear he might have released. According to this case, his power of releasing results from his interest: and this is consistent with the case of Thomson v. Butler, and with the opinion that his release does not operate on that which cannot take effect in his lifetime. If then the effect of his release results from his interest, its effect ought on principle to be coextensive with that interest. When the nature of the future right is such that he has no interest, his release is inoperative; and when, as in the case of a future covenant or promise, he has only a limited interest, it would follow that his release ought to operate only so far as his interest extends.

These observations refer only to cases where there is no immediate right of action. Different considerations might apply, if the future debt were secured, so that the husband might have an immediate right of action, as if a judgment had been given, or a bond of which part of the condition had been broken. The case might also be different, if the debt were actually paid to the husband before the time of its becoming due. In that case, the defence to an action brought by the wife surviving would be different, the question depending not on the release, but on the payment pleaded as a performance of the covenant or promise.

But whatever may be the rule of law with respect to the husband's release of a legal demand, it does not by any means follow, that the same rule must prevail with reference to equitable rights. The effects of releases of legal demands depend

(*a*) Hob. 216. (*b*) Ibid. (*c*) Cited *ante*, vol. i. p. 241.

on many technical rules as to joinder in action, and the forms of pleading, which are not adopted in equity. The effect of a release in equity is more analogous to that of an agreement or a grant, than to that of a release at law. The plea of a release must in general show, that it was founded on consideration (*a*), and the effect of the plea is in some other respects different from that at law (*b*). And a voluntary release of contingent and executory interests in equity, has been held inoperative, even as against the party releasing (*c*). In one case the Lord Chancellor says, that at law a possibility may be released, but distinguishes the case before him, because it was "a demand in equity under a trust (*d*)."

In Salkeld v. Vernon (*e*), the husband released his wife's orphanage share of her father's estate, receiving legacies under his will: yet it was considered doubtful whether this release of a present interest, and for consideration, could be binding upon the wife surviving. With respect to future interests in choses in action of an equitable nature, it was expressly laid down in Kemp v. Kelsey (*f*), that the husband could not release them; the same may be inferred from Bush v. Dalway, and Medcalfe v. Ives. The dictum of Lord Hardwicke in Bates v. Dandy, cited before, appears to allude to the distinction between releases of legal and equitable demands: "though he, the husband, cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money (*g*)." This seems to confine the husband's power of releasing to legal demands, such as those on bonds, making a distinction between them and others which he cannot affect, except for consideration.

There seems, therefore, no reason for supposing, that the husband can release the future equitable interests of the wife, so as to bind her surviving. The case may be different, if the sum due to the wife is actually paid to him, the question then being, whether payment before the day is not a sufficient defence. In Doswell v. Earle (*h*), the wife was entitled to a trust fund, subject to her mother's life interest: the trustee, with the assent of the mother, paid it to the husband, who afterwards

(*a*) See 2 Scho. and Lef. 728. Gilb. For. Rom. 57. Mitford on Pleadings, 212. (*b*) See 2 Bligh. 617. (*c*) Robinson v. Bavasor, 3 Vin. Ab. 155. Morris v. Burroughs, 1 Atk. 399. (*d*) 3 Vin. Ab. 155. (*e*) 1 Eden. 64. (*f*) *Ante*, p. 515. (*g*) 2 Atk. 208. (*h*) 12 Ves. 473.

died before the mother, leaving his wife surviving: it was held, that the latter was barred.

Another argument in favour of the opinion, that the husband can assign the future choses in action of his wife, is drawn from a supposed analogy to his power over her interests in terms of years. But the right which the husband has in his wife's chattels real, is essentially different from that which he has in her choses in action. With respect to the latter, he acquires by the marriage only the right of suing for them jointly with her, and reducing them into his possession; but until they are reduced into possession the whole right is in her. If the husband dies first, her right continues; and if a suit has been commenced, his death does not cause an abatement, except under particular circumstances (*a*). If she dies first, the right of action which the husband acquired by the marriage ceases: the property is still hers; the husband can only sue for it in the character of her administrator (*b*), and takes it subject to her debts (*c*).

On the other hand, with respect to the wife's chattels real, he acquires a legal estate by the marriage; he may bring ejectment in his own name (*d*), and on her death this estate continues in him, in his own right, without taking out administration (*e*). His power of assigning a legal interest in a term, is a legal power depending on the nature of his estate; his power of assigning an equitable interest in a term, arises by analogy to his power over a corresponding legal interest (*f*); and hence, in either case, his assignment does not require a consideration to support it: its effect does not depend on contract. But his assignment of a chose in action can only take effect as a contract. There is, therefore, no analogy between the cases.

The authorities do not settle how far the husband's power extends, with respect to those executory and contingent interests in legal terms of years which are not assignable at law, and with respect to corresponding equitable interests. According to Lampet's case (*g*), he may release them; but in that case the husband was alive at the time when the interest vested. An interest of this description resembles a chose in action in

(*a*) Anon. 3 Atk. 725. Coppin v. ———, 2 P. W. 496. Mitford's Pleadings, p. 47. (*b*) *Ante*, vol. i, p. 205. (*c*) *Ante*, p. 73. (*d*) *Ante*, vol. i, p. 185. (*e*) Ibid. p. 173. (*f*) Ibid. p. 177, 78. (*g*) 10 Co. 46.

not being assignable at law; and, therefore, an assignment of it must, it is said, be for valuable consideration (*a*), and is treated as standing on the footing of an agreement (*b*). It seems, therefore, that the question, whether the husband's assignment of such an interest will bind the wife surviving, depends upon principles similar to those which apply to his assignment of her future choses in action.

(*a*) 1 Atk. 280. 2 Atk. 208. (*b*) Theobald v. Duffoy, 9 Mod. 102.

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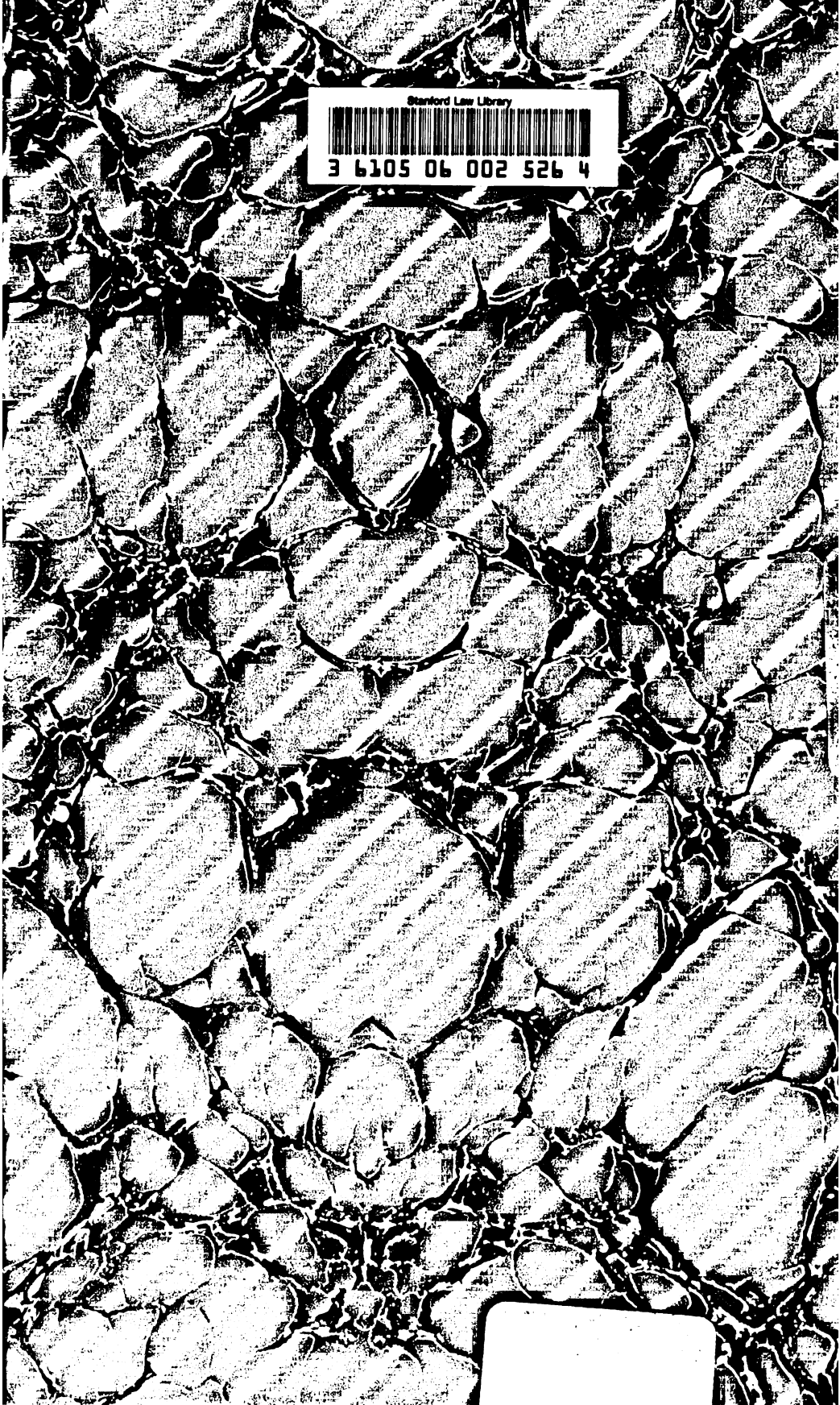
YORK,

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THE END.

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